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Supreme Court, U.S.
FILED
MAY 29 1997
CLERK

No. 96-1274

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

DIGITAL EQUIPMENT CORPORATION,

Petitioner

v.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,

Respondent

On Petition for a Writ of Certiorari to the
Supreme Court of Washington

REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. SUMMARY OF REPLY 1

II. ARGUMENT ON REPLY 2

A. Digital Preserved Its Due Process Claim 2

B. The Decision of the Washington Supreme Court Constitutes Binding Precedent on the Question Presented by Digital's Petition 4

C. Washington Did Not Afford Digital a Meaningful Predeprivation Remedy 6

1. No Meaningful Opportunity for Preliminary Injunctive Relief 6

2. No Meaningful Relief Under the Washington Declaratory Judgment Act, Absent the Effective Availability of Preliminary Injunctive Relief 9

D. The Department Offers No Defense of the Legislature's After-the-Fact Restriction of Remedies, in Light of This Court's Due Process Clause Precedents 9

III. CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Armco, Inc. v. Hardesty, 467 U.S. 638 (1984) 7, 8

Atchison, Topeka & Santa Fe Ry. Co. v. O'Connor, 223 U.S. 280 (1912) 1

B.F. Goodrich Co. v. State, 38 Wash. 2d 663, 231 P.2d 325 (1951) 7, 8

Bond v. Burrows, 103 Wash. 2d 153, 690 P.2d 1168 (1984) 8

Camps Newfound/Owatonna, Inc. v. Town of Harrison, ____ U.S. ____, 1997 WL 255351 (No. 94-1988, May 19, 1997) 1

General Motors Corp. v. State, 60 Wash. 2d 862, 376 P.2d 843 (1962), aff'd, 377 U.S. 436 (1964) 7, 8

Gran Financeria, S.A. v. Nordberg, 492 U.S. 33 (1989) 10

Great Northern Ry. Co. v. Cohn, 3 Wash. 2d 672, 101 P.2d 985 (1940) 9

Harper v. Virginia Dept. of Taxation, 509 U.S. 86 (1993) 1, 2, 10

McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18 (1990) 9

National Can Corp. v. Dept. of Revenue, 105 Wash. 2d 327, 715 P.2d 128 (1986), amended, 732 P.2d 134 (1987), rev'd sub nom. Tyler Pipe Industries, Inc. v. Washington State Department of Revenue, 483 U.S. 232 (1987) 7, 8

Nelson v. McClatchy Newspapers, Inc., 131 Wash. 2d 279, 931 P.2d 870 (1997) 5

Pacific Tel. & Tel. Co. v. State Tax Comm'n, 180 Wash. 673, 42 P.2d 420 (1935) 8

Reich v. Collins, 513 U.S. ____, 130 L. Ed. 2d 454 (1994) 1, 2, 3, 9

Reynoldsville Casket Co. v. Hyde, 514 U.S. ____, 131 L. Ed. 2d 820 (1995) 1, 2, 3, 9

Shutt v. Moore, 26 Wash. App. 450, 613 P.2d 1188 (1980) 8

Tyler Pipe Industries, Inc. v. Department of Revenue, 96 Wash. 2d 785, 638 P.2d 1213 (1982) 6, 7, 8

Tyler Pipe Industries, Inc. v. Washington State Department of Revenue, 483 U.S. 232 (1987) 1, 2, 5, 6, 7, 8, 9, 10

Yee v. Escondido, 503 U.S. 519 (1992) 2

STATUTES AND COURT RULES

RCW 7.24 9

RCW 82.32.150 . . . . . 6, 8

RCW 82.32.190 9

WAC 458-20-228(8)(c) 9

Washington Rule of Appellate Procedure 4.2 3

MISCELLANEOUS

Note, "The Precede ·al Value of Supreme Court Plurality Decisions," 80 Colum. L. Rev. 756 (1980) 4

SUMMARY OF REPLY

The Department of Revenue's brief evades the history (and evolution) of this Court's Due Process Clause precedents.[1] The Department does not deny that the Washington legislature adopted the 1987 credit law (in relevant part) to deprive taxpayers of their preexisting refund remedy, in the event a court ordered retrospective relief under Tyler Pipe Industries, Inc. v. Washington State Department of Revenue, 483 U.S. 232 (1987). Digital identified several reasons, grounded in the history and evolution of tax refund jurisprudence, why such an action can no longer be fairly reconciled with the mandates of due process, especially in the Commerce Clause context:

- This Court's shift in favor of protecting taxpayer rights, based on the fundamental principle that a state obtaining the money or property of others without authority must repay that money or property. See Pet. at 16-21 (citing and discussing Atchison, Topeka & Santa Fe Ry. Co. v. O'Connor, 223 U.S. 280 (1912), and related authorities);

- This Court's most recent articulation and application of these principles, in the context of continuing state efforts to avoid refunding tax monies collected in violation of the Commerce Clause, notwithstanding this Court's rejection of case-by-case retrospectivity. See Pet. at 22-23 (citing and discussing Reich v. Collins, 513 U.S. ___, 130 L. Ed. 2d 454 (1994), and Reynoldsville Casket Co. v. Hyde, 514 U.S. ___, 131 L. Ed. 2d 820 (1995)) & 25-26 (citing and discussing Harper v. Virginia Dept. of Taxation, 509 U.S. 86 (1993), and related authorities);

- The danger to free trade interests protected by the Commerce Clause, if states are allowed to refuse to refund monies collected from out-of-state taxpayers in violation of Commerce

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[1] Cf. Camps Newfound/Owatonna, Inc. v. Town of Harrison, ___ U.S. ___, 1997 WL 255351, *15 (No. 94-1988, May 19, 1997) ("history, including the history of commercial conflict that preceded the constitutional convention as well as the uniform course of Commerce Clause jurisprudence animated and enlightened by that early history, provides the context in which individual controversy must be judged").

Clause strictures, based on after-the-fact changes in state remedy laws made for the express purpose of avoiding making such restitution.

The Department's brief does not respond to these contentions. Instead, the Department urges this Court to deny Digital's petition, because this case ostensibly is not a proper vehicle for the resolution of the question presented by Digital's petition. The Department is wrong, for the reasons set forth below.

ARGUMENT ON REPLY

A. Digital Preserved Its Due Process Claim.

The Department claims Digital did not preserve the question presented by Digital's petition, because Digital ostensibly did not raise a due process theory in the trial court, based on either Reich v. Collins or Reynoldsville Casket Co. v. Hyde. Br. Opp. at 13-14. The Department ignores that Reich and Reynoldsville were decided by this Court *after the trial court had rendered its decision, and dismissed Digital's case*. Contrary to the Department's assertion, Digital raised a federal due process claim at each stage of the state court proceedings, and Digital only modified its *argument* in support of that claim in response to this Court's latest decisions in this area.[2]

In April 1994, Digital moved for partial summary judgment, on the grounds that Tyler Pipe should now be given retroactive effect, in light of Harper v. Virginia Dept. of Taxation and related authority. See Digital's Memorandum at 1-2, 15-25 (Reply. App. 1a-2a, 3a-18a). Digital also claimed it was entitled to a refund, and specifically argued that federal due process requirements forbade the retroactive application of the 1987 credit law. Id. at 21-24 (Reply. App. 12a-16a).[3] On September 9,

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[2]"Parties are not limited to the precise arguments they made below." Yee v. Escondido, 503 U.S. 519, 534 (1992) (citations omitted).

[3]When the Department cross-moved for a summary judgment of dismissal, (continued...)

the Thurston County Superior Court issued its "Opinion Letter," denying Digital's motion and granting the Department's motion in part (the court reserved ruling on the "interim period" of June 23 through August 11, 1987). See Pet. App. 40a-45a. On October 5, 1994, Digital moved for reconsideration, *and alerted the trial court to the pendency of Reich* (then scheduled for oral argument on October 11, 1994). See Digital's Reconsideration Motion at 13, n.4 (Reply App. 26a-27a); see also Reconsideration Motion at 11-15 (Reply App. 23a-30a). On November 7, 1994, the court denied reconsideration and granted the Department summary judgment on the interim period refund claim. See Dept. App. 1a-2a.

On November 18, the court entered its formal order of dismissal; on December 15, Digital timely appealed directly to the Washington Supreme Court. Nine days before -- on December 6 -- this Court decided Reich. On January 31, 1995, Digital submitted its Statement of Grounds for Direct Review,[4] in which Digital addressed the impact of Reich on the due process claim. Statement at 11-15 (Reply App. at 33a-36a). The Washington Supreme Court granted direct review. On May 3, 1995, Digital submitted its opening brief, in which Digital more fully developed its due process claim in light of Reich. See Opening Brief at 1-7, 26-33 (Reply App. 38a-43a, 44a-52a). On May 15, 1995, this Court decided Reynoldsville. On August 24, 1995, Digital submitted its Reply Brief, in which Digital set forth *precisely* the theory that Digital has presented to this Court, based expressly on this Court's reasoning in Reynoldsville. Reply Brief at 12 (Reply App. 57a-58a) (footnote omitted) (emphasis in the original); see also Reply Brief at 10-13, 16-23 (Reply App. 54a-59a, 60a-70a). At oral argument, Digital further elaborated on this theory, referencing several of the cases relied on before this Court. See Pet. App. at 70a-74a; Reply App. at 71a-76a.

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[3](...continued)
Digital reiterated its contention that the retroactive application of the 1987 credit law results in a denial of due process. See Digital's Response Memorandum at 27 (Reply App. 20a-21a) (emphasis added).

[4]See Washington Rule of Appellate Procedure 4.2 (discussing the requirement of the Statement of Grounds, in direct review cases).

At no time did the Department ever claim that Digital had failed to present this due process theory in the Superior Court. Moreover, the Washington Supreme Court *did* address the due process issue, but resolved it on the basis of a supposed oral argument admission that was never made (as Digital demonstrated in its motion for reconsideration). See Pet. at 12-15. In sum, Digital gave the Washington court system a fair opportunity to address the due process claim, and the Washington Supreme Court did address the issue.

B. The Decision of the Washington Supreme Court Constitutes Binding Precedent on the Question Presented by Digital's Petition.

The Department asserts that Justice Smith's opinion is of no precedential force on the due process claim, because Chief Justice Durham's concurrence supposedly constitutes the Washington Supreme Court's holding under the "narrowest grounds" doctrine for plurality opinions. See Br. Opp. at 3-10.[5] First, the Department ignores that Justice Guy expressly limited his dissent to "the retroactivity issue." 916 P.2d at 947 (Pet. App. 32a). Given that the retroactivity issue could not resolve Digital's refund claim for the interim period (June 23-August 11, 1987), and that Justice Guy also voted to affirm the trial court (Pet. App. 37a), Justice Guy (and his fellow dissenters on the retroactivity issue) therefore joined Justice Smith on the due process issue, making a seven vote majority for the ratio decidendi giving rise to the question presented by Digital's petition.

Second, Chief Justice Durham's concurrence is the antithesis of a decision based on the narrowest ground.[6] The Chief Justice based her concurrence on a ground that she admitted had not been raised by either party, and also conflicted with the

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[5]The Department also asserts that Digital inaccurately implied that Smith's ratio decidendi commanded a majority on all points in dispute. See Br. Opp. at 3, n.2. Digital said the *opposite*, acknowledging that Justice Smith's rationale did not command a majority, on all points. See Pet. at 12, n.16.

[6]See generally Note, "The Precedential Value of Supreme Court Plurality Decisions," 80 Colum. L. Rev. 756 (1980).

court's prior decisions. See 916 P.2d at 942 (Pet. App. 20a) ("I disagree with . . . some of the assumptions made by the parties and our prior cases"). This willingness to resolve a case on a ground not addressed in the briefing and argument (and which does not go to any question of subject matter jurisdiction) is not consistent with the conservative jurisprudential approach underlying the "narrowest grounds" test. Cf. Nelson v. McClatchy Newspapers, Inc., 131 Wash. 2d 279, 931 P.2d 870, 880 (1997) (majority opinion for the court by Sanders, J.) (criticizing the concurring minority for basing their decision on a ground which had "neither been raised nor briefed by the parties").

Moreover, Chief Justice Durham's preferred ground for decision required the court to hold that Digital was entitled to no relief, because Washington's multiple activities exemption tax scheme supposedly did not violate the Commerce Clause when applied to out-of-state manufacturers like Digital. See Pet. App. 23a-26a. To reach this result, the Chief Justice criticized *this Court* for what she called "erroneous suggestion[s]" and dicta in Tyler Pipe. See id. at 25a-26a.[7] Based on this critique, the Chief Justice urged her court to rule that the *1985* credit law constituted Digital's remedy for any constitutional violations, and that *this* law satisfied due process requirements. Pet. App. 29a.[8]

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[7]In fact, Chief Justice Durham plainly misread this Court's holding, which expressly found that applying the MAE tax scheme to out-of-state manufacturers also constituted a facial Commerce Clause violation. Tyler Pipe, 483 U.S. at 248.

[8]The Chief Justice proposed to avoid the retroactivity trigger of the 1987 credit law, by holding that the MAE scheme as it existed prior to August 1987 included the 1985 credit law, and that Digital's claim therefore would not be governed by the 1987 law. Pet. App. 29a. The Chief Justice did not explain how the 1985 credit law, *which substituted a credit to local manufacturers for the exemption they previously received while refusing to grant any credit to out-of-state manufacturers*, could possibly constitute a meaningful backward-looking remedy for Digital, should the court find that taxing Digital did violate the Commerce Clause. Nor did the Chief Justice explain how applying the 1985 credit law, pursuant to an after-the-fact retroactivity trigger substantively identical to the 1987 trigger, so as to wipe out Digital's refund claim for the period from January 1, 1983, to the date of the adoption of the 1985 law, could avoid *precisely* the due process infirmity at issue in this case.

In other words, Chief Justice Durham proposed that her colleagues hold that Tyler Pipe granted no relief to out-of-state manufacturers, and on that basis affirm the trial court. This suggestion ignored the plain language of this Court's decision, and would have been tantamount to declaring the 1987 credit law an exercise in legislative surplusage. Under no reasonable application of the "narrowest grounds" test, can this radical ratio decidendi be found to state the controlling rule of the Washington Supreme Court's decision in this case.

C. Washington Did Not Afford Digital a Meaningful Predeprivation Remedy.

The Department claims Digital had a meaningful predeprivation remedy, specifically: (1) the right to seek preliminary injunctive relief; and (2) the right to seek declaratory relief. See Br. Opp. at 23-24. The Department is wrong.

1. No Meaningful Opportunity for Preliminary Injunctive Relief. The Department claims RCW 82.32.150 represents a meaningful opportunity for preliminary injunctive relief, because the statute exempts constitutional challenges from its prohibition on "restraining order[s] or injunctions . . . to restrain or enjoin the collection of any tax . . . ." See Br. Opp. at 23, n.13 & 24, n.14; Pet. App. 62a (reproducing RCW 82.32.150). Although the Department criticizes Digital's reading of the Washington Supreme Court's decision in Tyler Pipe Industries, Inc. v. Department of Revenue, 96 Wash. 2d 785, 638 P.2d 1213 (1982),[9] the Department tacitly admits that this decision states the controlling test for preliminary injunctive relief in tax cases. See Br. Opp. at 24, n.14. Under that test, preliminary injunctive relief will not be granted unless (among other things) the taxpayer shows a "clear legal or equitable right" to relief. Tyler

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[9]Although the Department correctly states that the Washington Supreme Court has not *categorically* ruled out the possibility of preliminary injunctions in tax cases, the Department does not acknowledge that this reflects Washington's separation of powers doctrine, under which the Legislature could not *absolutely* prohibit the availability of such relief in a tax (or any other) case. Tyler Pipe, 638 P.2d at 1215 ("the legislature can never totally deprive the courts of their constitutional equity powers" (citation omitted)).

Pipe, 638 P.2d at 1217 (citation and quotation omitted). Moreover, the issuance of a preliminary injunction in "a doubtful case" constitutes an abuse of trial court discretion. Id. (citation and quotation omitted).

Contrary to the Department's claim, there are *three* principal time periods, relevant to this issue:

- January 1, 1983 to June 12, 1984. Prior to the date this Court decided Armco, Inc. v. Hardesty, 467 U.S. 638 (1984), any Commerce Clause challenge to the MAE scheme was indisputably controlled by the decisions in B.F. Goodrich Co. v. State, 38 Wash. 2d 663, 231 P.2d 325 (1951), and General Motors Corp. v. State, 60 Wash. 2d 862, 376 P.2d 843 (1962), aff'd, 377 U.S. 436 (1964), in which the Washington Supreme Court rejected such challenges. Given the obligation of Washington trial courts to follow these decisions under the rule of stare decisis, Digital did not have a meaningful opportunity for preliminary injunctive relief during this period.

- June 13, 1984 to March 6, 1986. Between Armco and the Washington Supreme Court's decision in National Can Corp. v. Department of Revenue, 105 Wash. 2d 327, 715 P.2d 128 (1986) (National Can I), Digital could have argued that Armco had fatally undermined the authority of the Washington Supreme Court's decisions in B.F. Goodrich and General Motors. But this at most would have given rise to the sort of "doubtful case" which the Washington Supreme Court had already held could not support a preliminary injunction. See Tyler Pipe, 638 P.2d at 1214.

- March 7, 1986 to June 22, 1987. Until this Court's Tyler Pipe decision, Washington trial courts were bound to reject Commerce Clause challenges to the MAE scheme, under the controlling authority of National Can I.

Thus, at no time from January 1, 1983, through this Court's decision in Tyler Pipe, did Digital have a meaningful opportunity for preliminary injunctive relief.[10] Before this

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[10]The taxes at issue for the first and third periods total approximately (continued...)

Court's decision in Armco, and again after National Can I, granting preliminary injunctive relief would have required a Washington trial court to disregard plainly controlling decisions of its Supreme Court. Between Armco and National Can I, the same trial court would have had to conclude that Armco so clearly undermined two otherwise controlling decisions of the Washington Supreme Court, as to render Digital's right to preliminary injunctive relief free of doubt. In short, Digital's theoretical right to seek preliminary injunctive relief did not constitute the *meaningful* opportunity for predeprivation relief that could relieve Washington of its due process obligation to afford a refund.[11]

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[10](...continued)
$1,035,000 and $608,000 for the second. There is also the "interim period," from June 23, 1987 through August 11, 1987 (the day before the 1987 tax credit law became effective). This, too, would have presented at best a doubtful case for preliminary injunctive relief, given the uncertain state of statutory remedies in the wake of Tyler Pipe. In fact, the Washington trial courts denied preliminary injunctive relief in the subsequent action brought to challenge the 1987 credit law, and the Washington Supreme Court refused to review that decision, on the ground that the trial court correctly determined there was no clear right to such relief. (Reply App. 79a-85a). There is no reason to believe the courts would have acted differently for claims arising during the interim period.

[11]The Department, citing the intermediate appeals court decision in Shutt v. Moore, 26 Wash. App. 450, 613 P.2d 1188 (1980), also claims a taxpayer need not prepay taxes when making a constitutional challenge. See Br. Opp. at 23, n.13. Shutt conclusorily asserts, by way of footnote dictum, that RCW 82.32.150 "waive[s]" the prepayment obligation in such circumstances. 613 P.2d at 1192 n.4. The statute does not say that, and Shutt was decided two years before the Washington Supreme Court's restrictive interpretation of RCW 82.32.150 in the first Tyler Pipe decision. The Department also claims the Washington trial or appellate courts "often have issued preliminary or permanent injunctions[,]" see Br. Opp. at 23, n.13, but the Department's cited authorities -- with one exception -- do not show a willingness to grant preliminary injunctions, or that Digital had a meaningful chance for any form of injunctive relief. See Bond v. Burrows, 103 Wash. 2d 153, 690 P.2d 1168 (1984) (granting only prospective relief); General Motors Corp., supra (reversing grant of permanent injunctive and refund relief to taxpayer); B.F. Goodrich Co., supra (granting permanent injunctive relief to taxpayer). The exception is Pacific Tel. & Tel. Co. v. State Tax Comm'n, 180 Wash. 673, 42 P.2d 420 (1935), and the precedential force of that case was effectively nullified by the 1982 Tyler Pipe decision. See Tyler Pipe, 638 P.2d at 1216.

2. No Meaningful Relief Under the Washington Declaratory Judgment Act, Absent the Effective Availability of Preliminary Injunctive Relief. The Department's invocation of the state declaratory relief act, RCW Chapter 7.24, is inexplicable. See Br. Opp. at 23, n.13. The Department offers no explanation how a declaration of relief, without an accompanying grant of preliminary injunctive relief, would amount to anything but another form of refund suit in which Digital would still have to pay the disputed taxes pendente lite. In fact -- and as the Department's own authorities confirm -- taxpayer declaratory suits generally combine a request for declaratory and injunctive relief. See, e.g., Great Northern Ry. Co. v. Cohn, 3 Wash. 2d 672, 101 P.2d 985 (1940), cited by Br. Opp. at 23, n.13. Yet, as shown, Digital had no realistic prospect of receiving preliminary injunctive relief.[12]

D. The Department Offers No Defense of the Legislature's After-the-Fact Restriction of Remedies, in Light of This Court's Due Process Clause Precedents.

The Department asserts Digital claims Reich and Reynoldsville have overruled "the McKesson line of cases." Br. Opp. at 22, 23. Digital has *never* made such a claim. The Department also asserts this Court would "have" to address the Department's argument in favor of continuing to give only prospective application to Tyler Pipe, if this Court grants the

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[12]In the fourth paragraph of footnote 13, found on page 24 of the Department's brief, the Department also asserts that RCW 82.32.190 "authorizes the Department of Revenue to stay the collection of tax 'from any taxpayer or group of taxpayers when a question bearing on their liability for tax' is 'pending in the courts[.]'" (edits the Department's). The Department offers not one example of when it has exercised its entirely discretionary authority under this statute, to relieve a taxpayer of the usual duty to pay first, then sue. Moreover, the Department does not acknowledge that its own regulations establish that relief will not be granted unless the Department determines "it is in the best interests of the state" to grant such relief. Reply App. 78a (WAC 458-20-228(8)(c)). Yet, the Department has historically and consistently maintained that maximum revenue collection is in the best interests of the State. The implication made by the Department in this case, that Washington taxpayers have numerous, realistic opportunities for predeprivation stays of the obligation to pay disputed taxes, is contradicted by the Department's historic practices; the Department's contrary implications are redolent of the Georgia Supreme Court's actions that this Court condemned in Reich.

petition. Br. Opp. at 27. This Court does not "have" to address an issue that the Department could have, but did not, raise by cross-petition.[13] Besides these two points (and the claim that Digital had an adequate predeprivation remedy), the Department offers no response to the substantive reasons Digital set forth for granting the writ.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[13]While this Court will consider alternative grounds for affirmance even when rejected by a lower court, this Court will not do so when the Respondent has failed to cross-petition, and affirmance on the alternative ground would expand the Respondent's rights as established by the judgment. E.g., Gran Financeria, S.A. v. Nordberg, 492 U.S. 33, 38-40 (1989). Here, the Department's rights would be expanded by affirmance on its proffered prospectivity ground, because the Department could then refuse retrospective relief to those parties who now qualify for credits for pre-Tyler Pipe taxing periods, under the authority of the Washington Supreme Court's decision in this case. The Department also makes no attempt to show, in light of Harper and related authority, how the Washington Supreme Court's decision to give retroactive effect to Tyler Pipe warrants this Court's review.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THURSTON COUNTY

DIGITAL EQUIPMENT CORPORATION,	)	
Plaintiff,	)	NO. 87-2-01627-4
v.	)	MEMORANDUM IN SUPPORT OF PLAINTIFF DIGITAL EQUIPMENT CORPORATION'S MOTION FOR PARTIAL SUMMARY JUDGMENT
STATE OF WASHINGTON, DEPARTMENT OF REVENUE,	)	
Defendant.	)	

I. RELIEF REQUESTED

Plaintiff Digital Equipment Corporation ("Digital") files this memorandum in support of its motion for partial summary judgment. Filed simultaneously with this motion, Digital submits the Declaration of R. S. Kuraska and the Affidavit of George C. Mastrodonato with Exhibits which, together, set forth all the facts necessary for the court to render a partial summary judgment in this matter. In addition, the ultimate issue presented in this case is purely a question of law.

Digital moves for an order granting partial summary judgment in its favor in the amount of $1,706,877 (see Declaration of R. S. [p. 2] Kuraska, ¶ 7), $1,646,437 (see Declaration of R. S. Kuraska, ¶ 8), or such other amount as the court may order following an audit or other verification of Digital's records by the Defendant Department of Revenue ("Department") for the reporting periods set forth in the complaint (see Declaration of R. S. Kuraska, ¶ 10), together with an award of reasonable attorneys' fees under 42 U.S.C. §§ 1983 and 1988.

II. BACKGROUND INFORMATION

Prior to 1985, the Washington business and occupation ("B&O") tax law (chapter 82.04 RCW) contained a "multiple activities exemption" statute, RCW 82.04.440. See Exhibit A. Under RCW 82.04.440, Washington extractors and manufacturers that paid "extracting" (RCW 82.04.230) or "manufacturing" (RCW 82.04.240) B&O taxes in Washington were allowed an exemption from the payment of "selling" (i.e., "wholesaling" (RCW 82.04.270) or "retailing" (RCW 82.04.250)) B&O taxes for goods sold at wholesale or retail in this state.

At the time, the multiple activities exemption law did not allow Washington extractors or manufacturers an exemption from "extracting" or "manufacturing" B&O taxes for any selling taxes paid outside the state, nor did the law give an exemption to out-of-state extractors or manufacturers from the selling B&O taxes imposed by Washington. During this time period, Digital was an out-of-state manufacturer paying wholesaling and retailing B&O taxes to the State of Washington. See Declaration of R. S. Kuraska, ¶¶ 3, 4, and 5.

. . . . [p. 15]

to their interpretations of federal law. [Citations omitted]". Id. Thus, the federal law is the supreme law of the land and the federal law on retroactivity is expressed in decisions of the United States Supreme Court.

Here, the United States Supreme Court invalidated the Washington multiple activities statute (RCW 82.04.440) in Tyler Pipe. Federal law requires that the ruling be applied retroactively. While the Washington Supreme Court in National Can initially held in 1988 that Tyler Pipe did not apply retroactively, the United States Supreme Court's decisions in Beam

and Harper now succinctly impose such a requirement. The ruling in Tyler Pipe must be applied retroactively to grant refunds in all cases still open on direct review.

B. Digital Is Entitled To A Refund Of B&O Taxes Declared Unconstitutional In Tyler Pipe.

The taxpayers who successfully challenged Washington's B&O tax in Tyler Pipe failed to recover refunds in National Can only because the Washington Supreme Court denied retroactive application to Tyler Pipe based on Chevron. In Beam and Harper, the United States Supreme Court clearly rejected Chevron and mandated that retroactive refunds must be made in cases where the Court has declared a state tax unconstitutional. Indeed, Beam and Harper establish three things: (1) retroactive application of a decision is the normal practice; (2) unless a United States Supreme Court decision specifically reserves the issue of retroactivity, lower courts must interpret the decision as having retroactive effect; and (3) because prospective application of a decision would [p. 16] give retroactive benefit to no one, any discussion of remedies in a United States Supreme Court decision

must be interpreted as acknowledgement that the decision has retroactive effect for everyone.

The Harper Court noted that a majority of the justices in Beam agreed "that a rule of federal law, once announced and applied to the parties to the controversy, must be given full retroactive effect by all courts adjudicating federal law". Beam, 125 L. Ed. 2d, at 86. The Harper Court acknowledged that Beam "did not produce a unified opinion", but:

> In announcing the judgment of the Court, Justice Souter laid down a rule for determining the retroactive effect of a civil decision: After the case announcing any rule of federal law has "appl[ied] that rule with respect to the litigants" before the court, no court may "refuse to apply [that] rule . . . retroactively." Id., at _ (slip op., at 9) (opinion of Souter, J., joined by Stevens, J.). Justice Souter's view of retroactivity superseded "any claim based on a Chevron Oil analysis." Ibid. Justice White likewise concluded that a decision "extending the benefit of the judgment" to the winning party "is to be applied to other litigants whose cases were not final at the time of the [first] decision." Id., at __ (slip op., at 1) (opinion concurring in judgment). Three other Justices agreed that "our judicial responsibility . . . require[es] retroactive application of each . . . rule we announce." Id. at (slip op., at 2). . . . (Emphasis supplied.)

The Court went on to state:

> Beam controls this case, and we accordingly adopt a rule that fairly reflects the position of a majority of Justices in Beam: When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events [p. 17] predate or postdate our announcement of the rule. (Emphasis supplied.)

Harper, 125 L. Ed. 2d at 86.

The Washington Supreme Court has even recognized the United States Supreme Court's analysis and holdings in Beam and Harper. In a recent decision, Robinson v. Seattle, 119 Wn.2d 34, 830 P.2d 318 (1992) (Exhibit M), the Washington Supreme Court acknowledged that "the United States Supreme Court has recently limited the Chevron Oil Co. v. Huson, supra, rule regarding retroactive application in the case of James B. Beam Distilling Co. v. Georgia, [citations omitted]." Robinson at 73.

Thus, the federal law on retroactivity is as announced by the United States Supreme Court in Beam and Harper. In

Robinson, the Washington Supreme Court recognized this new federal rule of retroactivity as the current state of the law in this state as well.

C. The National Can and American National Can Cases Are Not Controlling.

1. National Can.

The Washington Supreme Court in Robinson recognized that the Chevron test relied on in National Can, is no longer valid. The court specifically found:

> While our decision in National Can relied in part on the Chevron Oil analysis, we now modify our rule from National Can in a manner consistent with the limitations on the Chevron Oil rule effected in Beam Distilling.

Robinson, supra at 77. It follows that the ruling denying retroactive B&O tax refunds in National Can is not authority for [p. 18] denying such refunds to Digital. Again, as the United States Supreme Court explained in Harper: "[T]he legal imperative 'to apply a rule of federal law retroactively after the case announcing the rule has already done so' must 'prevai[l] over any claim based on a Chevron Oil analysis.'" Harper, 125 L. Ed.

2d at 87. In the wake of Beam and Harper, the Due Process Clause of the United States Constitution requires retroactive relief for Washington taxpayers "whose cases are still open on direct review." Id., at 86. Digital's case, still pending in Thurston County Superior Court, is one of those "cases . . . still open on direct review". Id.

In short, the recent United States Supreme Court decisions in Beam and Harper have made the Washington Supreme Court's prior non-retroactivity ruling in National Can obsolete. Since Digital's case is a matter "still open on direct review", Digital is entitled to a refund of B&O taxes paid prior to the enactment of the 1987 credit law.

2. American National Can.

The Washington Supreme Court's decision in American National Can is likewise not controlling. The court in American National Can held that the 1987 and 1985 credit or exemption laws were to be read together to remedy the constitutional deficiencies found in Tyler Pipe. Citing section 3 of the 1987 credit law, the court found the legislature had intended to retroactively apply the act's credit scheme in the event a court

determined relief was appropriate for any periods prior to the act's effective date. [p. 19] American National Can, supra, at 250. The court went on to hold that Tyler required some relief to taxpayers for the interim period[7] but limited the relief to the credits provided under the 1985 and 1987 credit laws.

The taxpayers in American National Can, however, did not raise the Supremacy Clause arguments upon which the United States Supreme Court decided Harper. Nor did the taxpayers challenge the interpretation of RCW 82.04.440 or the Department's selection of manufacturing and extracting taxes for credits. Instead, the taxpayers sought to invalidate the 1987 credit law as a violation of the Commerce Clause arguing that the state's failure to grant credits for income taxes or excise taxes paid in other states constituted discrimination against interstate businesses. The taxpayers further argued that the state's failure to give them refunds violated due process and equal protection guarantees.[8]

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[7]The six weeks between the date of the Supreme Court's Tyler Pipe decision, June 23, 1987, and the date the legislature amended RCW 82.04.440, August 11, 1987.

[8]In the American National Can case, taxpayers also challenged (continued...)

Digital does not challenge the Washington Supreme Court's decision that the 1987 credit law remedied the defects found by the United States Supreme Court in Tyler Pipe after August 11, 1987. Digital does, however, challenge the Washington Supreme Court's [p. 20] decision that the taxpayers in American National Can were only entitled to the credits provided by the 1987 credit law, and not full refunds. The United States Supreme Court's rulings in Beam and Harper cast serious doubt on the validity of this Washington Supreme Court retroactivity analysis and holding that taxpayers were not entitled to full refunds for the interim period after Tyler Pipe. In fact, the Washington Supreme Court, in the course of its analysis, actually established the deficiency of the credit as a remedy under Beam and Harper.

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[8](...continued)
the retroactive application of the credits on separation of powers grounds. The Washington Supreme Court summarily dismissed this argument stating, "(S)tate law governs the relationship between the Washington legislature and its courts. Accordingly, our discussion rests entirely upon our independent opinion of the requirements of the Washington State Constitution. . . . Federal law does not compel the results reached in this case." American National Can, at 252.

In analyzing the credit allowed under the 1987 credit law, the Washington Supreme Court specifically found that the $1,304,000 worth of credits applied for by taxpayers under the 1987 credit law was a "small fraction" of the total taxes actually collected. The court dismissed the inequality, however, by stating that the fact businesses had applied for $1,304,000 in credits" . . . proved beyond a shadow of a doubt that the new law had a practical effect". American National Can, supra, at 247-248. The court thus dismissed the taxpayers' argument as merely a complaint about the magnitude of the credits' effect.

However, the court's acknowledgement of the disparity between the amount of taxes actually collected and the amount of credits retroactively given becomes additional evidence of Digital's right to a full refund today. Obviously, this analysis shows that the Washington Supreme Court failed to envision the United States Supreme Court's subsequent decision in Harper, which [p. 21] imposes the requirement that full retroactive effect must be given to new federal rulings, like the one made in Tyler Pipe.

D. The State's Attempt To Make The 1987 Credit Law Retroactive Is Invalid.

Notwithstanding Beam and Harper, it is Digital's understanding that the Department will argue that the legislature's 1987 amendments to RCW 82.04.440 provided a remedy to taxpayers in the form of credits which were consistent with Tyler Pipe, and that the legislature could, as a matter of state law, make the remedy applicable retroactively. However, this argument does not fully appreciate the requirements now imposed on states by the United States Supreme Court in Beam and Harper.

First, the United States Supreme Court invalidated Washington's multiple activities statute, RCW 82.04.440, in Tyler Pipe. Subsequently, the Court held in Beam and Harper that when it applies a rule of federal law, that rule must be given full retroactive effect to all cases open on direct review.

Second, while the United States Supreme Court in Harper refused to enter a judgment for the taxpayers, indicating that federal law did not necessarily entitle them to a refund, the Court specifically stated that the Supremacy Clause does not allow a state to supplant the federal retroactivity doctrine through state

law. Rather, the Supreme Court held that the Constitution required the state, in this case Virginia, to fashion the appropriate remedy for taxpayers. The Court then set forth the standards for determining the constitutional sufficiency of any remedy to be adopted by Virginia. [p. 22]

The United States Supreme Court held that the constitutionally sufficient remedy turned initially on an assessment of whether taxpayers had been offered a meaningful opportunity to withhold the contested tax assessments and to challenge the validity of the assessments in a predeprivation hearing.[9] If no such predeprivation remedy existed, as in the state of Washington (Id.), the Due Process Clause of the Fourteenth Amendment obligated the state to provide meaningful backward looking relief to rectify any unconstitutional deprivation. McKesson, 496 U.S. 18, 39-40. In providing such relief, the state could either award full refunds to those burdened by an unlawful tax, or issue some other order creating "in hindsight a non-discriminatory scheme". Harper, 125 L. Ed. 2d, at 89 citing McKesson, supra, and Davis, 489 U.S.

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[9]See fn. 4, supra.

at 818. Finally, the Court cautioned that although a state law could provide relief beyond the demands of federal due process, under no circumstances could a state law confine taxpayers to a lesser remedy. Harper, 125 L. Ed. 2d, at 89.

In this case, there is no question that the United States Supreme Court in Tyler Pipe found that Washington's multiple activities exemption statute discriminated against interstate commerce. There is also no question that the Washington Supreme Court in National Can and American National Can refused to provide taxpayers with full refunds of the unconstitutionally assessed B&O taxes at issue here, based on the now-erroneous retroactive [p. 23] application of the 1987 credit law. (This remedy is no longer tenable under the federal retroactivity law established by Beam and Harper.) And finally, there is no question that the Washington Supreme Court found the 1987 credit law provided taxpayers a credit representing only a small fraction of the total taxes collected under the previous unconstitutional provision.[10]

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[10]In fact, Digital has received no credits. See Declaration of R. S. Kuraska, ¶ 9.

To comply with Harper, the state must either (1) award full refunds to those burdened by an unlawful tax or (2) issue some other order that creates, in hindsight, a non-discriminatory scheme. Harper, 125 L. Ed. 2d at 89. To comply with Harper, the remedies adopted by the state must be substantially equivalent. Since the retroactive application of the 1987 credit law provides for a significantly lesser credit rather than a full refund to affected taxpayers, the state has not complied with either of the rules set forth in Harper. Additionally, Harper clearly requires a "full refund" so that even if a credit is determined to be the same as a refund, the credit provided is not the equivalent of what taxpayers would have received with full refunds. This was even conceded by the Washington Supreme Court in American National Can.

Nor has Washington complied with the second option by creating in hindsight a non-discriminatory scheme. The fact that RCW 82.04.440 attempts to retroactively provide a credit for a small fraction of the taxes actually paid does not relieve the state of its obligation to create a non-discriminatory remedy. A [p. 24] non-discriminatory credit could only result if the credit was

equal to the full amount of tax paid under the unconstitutional provision.

Consistent with Harper, the state of Washington could have fashioned a remedy that would have provided a credit equal to the amount of tax unconstitutionally paid, or set up a scheme under which the state could have retroactively imposed an equal assessment on intrastate manufacturers. It has not done either. In sum, state law cannot meet the demands of federal due process by confining interstate manufacturers, like Digital, to a lesser remedy.

E. Digital Is Entitled To A Refund of B&O Taxes Paid For All Periods Open Under The Statute of Limitations (RCW 82.32.060) Prior To The Date Of The Enactment Of The 1987 Credit Law.

Beam held that once the Supreme Court has applied a rule of law to the litigants in one case, it must do so with respect to all others not barred by procedural requirements or res judicata.[11] The applicable statute of limitations in the case of

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[11]The doctrine of res judicata is not relevant because this case has been pending since 1987.

tax refunds is RCW 82.32.060(1). It provides in pertinent part as follows:

> If, upon receipt of an application by a taxpayer for a refund . . . it is determined by the department that within the statutory period for assessment of taxes, penalties, or interest prescribed by RCW 82.32.050 any amount of tax, penalty, or interest has been paid in excess of that properly due, the excess amount paid within, or attributable to, such period shall be credited to the taxpayer's account or shall be refunded to [p. 25] the taxpayer, at the taxpayer's option. Except as provided in subsections (2) and (3) of this section, no refund or credit shall be made for taxes, penalties, or interest paid more than four years prior to the beginning of the calendar year in which the refund application is made or examination of records is completed.

Here, Digital filed a petition for refund in Thurston County Superior Court in August, 1987. Under RCW 82.32.050, Digital is entitled to a refund of the B&O taxes paid in violation of the Commerce Clause of the United States Constitution from January 1, 1983 through August 11, 1987, the date prior to the effective date of the 1987 credit law.[12]

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[12]The 1987 credit law was declared constitutional by the (continued...)

F. Digital Is Entitled To Recover Its Costs and Reasonable Attorneys Fees Under 42 U.S.C. §§ 1983 and 1988.

In Dennis v. Higgins, 498 U.S. 439, 112 L. Ed. 2d 969, 111 S. Ct. 865 (1991), the United States Supreme Court ruled that suits for violations of the United States Constitution (here, the Commerce Clause) may be brought under 42 U.S.C. § 1983, and persons injured by state action that violates rights guaranteed by the Constitution may obtain injunctive and declaratory relief, ...

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[12](...continued)
Washington Supreme Court in American National Can Corporation v. Department of Revenue, 114 Wn.2d 236, 787 P.2d 545 (1990). The amended law was also applied retroactively to the interim period between the date of the United States Supreme Court's decision in Tyler Pipe (June 23, 1987) and the date the 1987 credit law became effective (August 11, 1987). As previously argued, Beam and Harper place into question this portion of the American National Can decision. Due to the short time frame of the interim period (six weeks), if this court should find that the 1987 credit law does relate back to the date Tyler Pipe was decided, then DEC's refund will cover the period January 1, 1983 through June 23, 1987. The Declaration of R. S. Kuraska sets forth the refund requested for this period. See ¶ 8.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THURSTON COUNTY

DIGITAL EQUIPMENT CORPORATION, Plaintiff, v. STATE OF WASHINGTON, DEPARTMENT OF REVENUE, Defendant.	NO. 87-2-01627-4 DIGITAL EQUIPMENT CORPORATION'S RESPONSE TO DEPARTMENT OF REVENUE MEMORANDUM IN IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Digital Equipment Corporation ("Digital") filed a motion for partial summary judgment under CR 56 against the Department of Revenue ("Department") on April 11, 1994. In its motion, Digital alleged that there were no genuine issues of material fact and, as a consequence, was entitled to partial summary judgment as a matter of law.

The Department subsequently filed a cross-motion for summary judgment on April 18, 1994, also alleging there were no

genuine issues of material fact in the case and that it was entitled to a judgment as a matter of law.

Digital submits this memorandum in response to the Department's cross-motion for summary judgment.

. . . . [p. 27]

. . . requirements of federal due process of law. Under federal due process requirements, the retroactive application of the 1987 credit law results in a denial of due process since it denies taxpayers a full refund on the basis that the statute at issue in Tyler Pipe was unconstitutional. Indeed, in American National Can, the court acknowledged that the credits allowed under the 1987 credit law were a "small fraction" of the total taxes actually collected, but dismissed taxpayers' arguments as "merely a complaint about the magnitude of the credits' effect". Id., at 247-248. Thus, the court held Tyler Pipe to be limited to prospective relief only. The Department's current reliance on American National Can is, at best, tenuous. The 1987 credit law may have been constitutional on its face, but after the court's decision in American National Can, the law must be held unconstitutional as applied.

Further, it may be that the state could, on a prospective basis, design a tax scheme that meets minimum federal due process requirements, but when applied retroactively, does not meet such due process requirements because the scheme provides less than full refunds or credits to affected taxpayers. This would be the result of giving full retroactive effect to the 1987 credit law. The requirements of federal due process under an unconstitutional tax system are clearly not met by these minimum requirements. Instead, federal law mandates full refunds, or the equivalent, during the period in which the law was declared to be unconstitutional.

In summary, Digital is entitled to either a full refund . . . .

. . . .

SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

DIGITAL EQUIPMENT CORPORATION,	)	
Plaintiff,	)	NO. 87-2-01627-4
v.	)	MOTION FOR RECONSIDERATION
STATE OF WASHINGTON, DEPARTMENT OF REVENUE,	)	AND SUPPORTING MEMORANDUM
Defendant.	)	

I. RELIEF REQUESTED

Plaintiff Digital Equipment Corporation ("Digital"), by and through its attorneys George C. Mastrodonato and Lane Powell Spears Lubersky, moves this court for reconsideration of the court's September 9, 1994 Opinion Letter, and declares:

A. Digital is entitled to a refund of Business and Occupation ("B&O") taxes paid to the defendant, Department of Revenue ("Department"), during the period January 1, 1983 through August 11, 1987, under the United States Supreme Court's ruling in Tyler Pipe Industries, Inc., et al. v. Washington

Department of Revenue, 483 U.S. 232, 97 L. Ed. 2d 199, 107 S. Ct. 2810 (1987) . . . .

. . . . [p. 11]

. . . Beam, 111 S. Ct., at 2447. So, the court's concern over the fact that Digital may obtain a B&O tax refund where, under similar or identical circumstances National Can and former litigants failed, resulting "in opposite treatment for two similarly situated litigants . . . with the original litigant . . . getting the decidedly short end of the legal stick", is wholly inconsistent with the Court's ruling in Beam.[1]

C. After Harper The Only Situation That Might Preclude Retroactive Refunds To Taxpayers Who Paid An Unconstitutional State Tax Is If The State Provided A Predeprivation Process That Satisfied Federal Due Process Guidelines.

"Harper's major effect on subsequent cases is the Court's holding that its application of a rule of federal law shall be given retroactive effect in all future cases. Harper, . . . 113 S. Ct.,

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[1]In its Opinion Letter, the court primarily relies on Tyler Pipe, National Can II and American Trucking Assoc., Inc. v. Scheiner, 483 U.S. 266, 97 L. Ed. 2d 226, 107 S. Ct. 2829 (1987), to support its ruling. Tyler Pipe, National Can II and Scheiner were all cases decided prior to Beam and Harper.

at 2513. See United Food and Commercial Workers Int'l Union AFL-CIO, Local No. 150-A v. NLRB, 1 F.3d 24, 35 (D.C. Cir. 1993)." Cambridge State Bank and Norwest Bank Duluth, National Association, et al. v. John P. James, et al., 514 N.W. 2d 565, 568, n. 5 (1994).[2] But, because a rule of federal law must be given retroactive effect, this does not necessarily entitle a taxpayer to [p. 12] a refund. Harper, 113 S. Ct., at 2519. Instead, the Constitution requires a state like Washington

> . . . "to provide relief consistent with federal due process principles." American Trucking, 496 U. S., at 181, 110 S. Ct., at 2332 (plurality opinion). Under the Due Process Clause, U. S. Const., Amdt. 14, § 1, "a State found to have imposed an impermissibly discriminatory tax

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[2]In this case, the Minnesota state supreme court, observing that Harper permits a state to deny aggrieved taxpayers a retroactive remedy only if it affords them a meaningful predeprivation remedy, held that Minnesota had not afforded banks a predeprivation remedy sufficient to satisfy the McKesson federal due process standards because the question of whether a Minnesota taxpayer could pose a constitutional challenge to a state tax without first paying the contested tax was unsettled at the time the banks filed their suit and, thus, at the time the banks initiated their suit, the only certain remedy available was the tax refund statute under which they proceeded. A petition for certiorari has been filed with the United States Supreme Court and is pending in this case. Norwest Bank Duluth and Cambridge State Bank et al., U.S. Supreme Court, Docket No. 94-331, petition for certiorari filed August 22, 1994.

> retains flexibility in responding to this determination." McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 U. S. 18, 39-40, 110 S. Ct. 2238, 2251-2252, 110 L. Ed. 2d 17 (1990). If Virginia "offers a meaningful opportunity for taxpayers to withhold contested tax assessments and to challenge their validity in a predeprivation hearing," the "availability of a predeprivation hearing constitutes a procedural safeguard . . . sufficient by itself to satisfy the Due Process Clause." Id., at 38, n. 21, 110 S. Ct., at 2251, n. 21. On the other hand, if no such predeprivation remedy exists, "the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation." Id., at 31, 110 S. Ct., at 2247 (footnotes omitted). In providing such relief, a State may either award full refunds to those burdened by an unlawful tax or issue some other order that "create[s] in hindsight a nondiscriminatory scheme." Id., at 40, 110 S. Ct., at 2252. Cf. Davis, 489 U.S., at 818, 109 S. Ct., at 1509 . . .

Harper, 113 S. Ct., at 2519-2520. Thus, McKesson held that a state may choose to provide taxpayers with either a predeprivation or postdeprivation procedure.[3]

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[3]"A predeprivation procedure must allow taxpayers to sue to enjoin imposition of the tax prior to payment or to withhold payment and present their objections as defenses in a tax enforcement proceeding. . . . [A] postdeprivation procedure, however, . . . must provide one of the following 'clear and certain' remedies: a refund of taxes unlawfully exacted, a retroactive tax on the benefitted taxpayers, or a combination of a

(continued...)

> Harper holds that the existence of a predeprivation remedy which meets the tests set out in McKesson is a preliminary question which determines the remedy required for an unlawful tax under the Due Process Clause of the federal constitution. Harper, --- U. S. at ---, 113 S. Ct. at 2519. . . . [A]fter Harper the existence of a meaningful predeprivation remedy is a necessary [p. 13] precondition to denying a retroactive remedy on any state law theory.

Cambridge State Bank, 514 N.W. 2d, at 569. Thus, if there was a meaningful predeprivation procedure in Washington at the time Digital paid the B&O taxes in question, then this court may deny backward-looking (retroactive) relief. On the other hand, if those procedures did not exist or were not "meaningful" then the court must design a "clear and certain" backward-looking remedy which creates in hindsight a non-discriminatory tax scheme. See Cambridge State Bank, 514 N.W.2d, at 568.[4]

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[3](...continued)
partial refund and a partial retroactive assessment to create "in hindsight a nondiscriminatory scheme." Cambridge State Bank, 514 N.W.2d, at 568.

[4]The U.S. Supreme Court will hear oral arguments on October 11, 1994, in a case to decide whether Georgia provided a clear and certain remedy to federal retirees who paid state income taxes that were illegal under the doctrine of intergovernmental immunity. Reich v. Collins, 263, Ga. 602, 437
(continued...)

McKesson held that if a state chooses this latter course of action, it must provide retrospective relief upon a determination that the tax was unlawfully enacted. McKesson, 110 S. Ct., at 2251-2252. Washington did not and does not provide taxpayers with the opportunity to challenge a tax assessment in court without first paying the taxes at issue (see RCW 82.32.180), and so its predeprivation procedures do not satisfy federal due process requirements.

Between 1983 and 1987, the period during which Digital seeks a B&O tax refund, as well as today, taxpayers challenging

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[4](...continued)
S.E.2d 310 (1993). At issue in this case is whether Georgia afforded a federal military retiree sufficient predeprivation remedies to justify its denial of his request for a refund of the Georgia personal income tax that he had paid on his federal military retirement benefits. Despite its refusal to grant refunds to federal retirees, Georgia has amended its tax law to provide identical treatment for federal, state, and private pensions. After the Georgia Supreme Court (Ibid.) upheld the state's refusal of refunds, the U.S. Supreme Court remanded the case (Reich (No. 92-1276, June 28, 1993) for reconsideration in light of Harper. On remand, the Georgia court ruled that the taxpayer was not entitled to a refund because he had been given ample predeprivation remedies allowing a challenge to the tax imposed prior to payment of the tax, which satisfied federal due process requirements. (Reich, U.S. Supreme Court, Docket No. 93-908, petition for certiorari granted February 22, 1994; oral argument scheduled for October 11, 1994.)

taxes in [p. 14] Washington are able to file for tax refunds in Superior Court, but are required to pay the taxes first. RCW 82.32.180.[5] Further, RCW 82.32.150 allows taxpayers the opportunity to seek injunctions against the state in tax cases involving constitutional claims. But, as argued in Digital's Reply To Department's Memorandum In Opposition To Motion For Partial Summary Judgment (see Section IV) and Response To Department Of Revenue Memorandum In Support Of Cross-Motion For Summary Judgment (see Section IV., B., 1.), the Department vigorously opposes such requests. See Tyler Pipe Industries v. Department of Revenue, 96 Wn.2d 785, 638 P.2d 1213 (1982) (A taxpayer seeking an injunction against the state in a tax case based on constitutional grounds must not only satisfy

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[5]The state did have an administrative procedure for contesting tax assessments without first paying the contested taxes (see RCW 82.32.160 and WAC 458-20-100) but administrative bodies cannot rule on the constitutionality of statutes (Yakima Clean Air v. Glascam Builders, 85 Wn.2d 255, 534 P.2d 33 (1975)). Moreover, paying the contested taxes prior to filing a refund suit in Thurston County Superior Court is a statutory prerequisite to having the case heard outside the Department's administrative hearing process. This administrative hearing process does not provide taxpayers the "meaningful opportunity" to challenge a tax assessment in court prior to paying the disputed taxes as required by McKesson.

RCW 82.32.150, but must also meet the equitable criterion governing an injunction's issuance because "injunctive relief will not be granted where there is a plain, complete, speedy and adequate remedy at law" and Washington law "provides the legal remedy of a refund suit"). Thus, during the tax period in question, Washington clearly did not provide a meaningful predeprivation remedy to taxpayers paying unconstitutional taxes.

McKesson commands that the court "design a clear and certain remedy which creates in hindsight a nondiscriminatory scheme." Cambridge State Bank, 514 N. W. 2d, at 571, citing McKesson, 110 S. [p. 15] Ct., at 2251-2252. What, then, creates an in hindsight nondiscriminatory scheme? McKesson offers three choices: (1) a full refund of the unconstitutional taxes collected, (2) a retroactive tax on taxpayers exempted from the B&O tax, or (3) a combination of the two remedies. McKesson, 110 S. Ct., at 2252-2253. In reality, however, there is now only one option to Digital remaining - a full refund of the unconstitutional B&O taxes it paid between January 1, 1983 and August 11, 1987. This is so because the statute of limitations for assessments (RCW 82.32.050) against other taxpayers has expired for this period, thereby eliminating options (2) and (3) above.

If this court does not choose relief in the form of a full refund of taxes paid, the court must then fashion a remedy which satisfies "minimum federal requirements". McKesson, 110 S. Ct., at 2257-2258. This "allows relief beyond the demands of federal due process", 110 S. Ct. at 2258, N. 36, "but under no circumstances may it confine [taxpayers] to a lesser remedy", Harper, 113 S. Ct., at 2520, citing McKesson, 110 S. Ct., at 2254-2258.[6]

VI. CONCLUSION

Beam and Harper require that the Court's ruling in Tyler Pipe be applied retroactively. Equitable considerations have been negated by the Supreme Court's directives in Harper. Digital is entitled to receive a tax refund even if National Can failed in its efforts. The only factor that would deny Digital a retroactive

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[6]The Department may again argue that the B&O tax credits (see RCW 82.04.440) enacted effective August 12, 1987, satisfy federal due process requirements. However, this will confine Digital "to a lesser remedy" which is forbidden by both Harper and McKesson.

No. 62414-3

SUPREME COURT
OF THE STATE OF WASHINGTON

DIGITAL EQUIPMENT CORPORATION,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent.

Appeal From Thurston County Superior Court
Honorable Wm. Thomas McPhee

STATEMENT OF GROUNDS FOR DIRECT REVIEW

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. . . . [p. 11]

. . . one of the litigants in National Can II or in American National Can.

The Superior Court was also bothered by the fact that Digital might receive a refund, where the National Can II litigants did not. Beam directly disposes of this point:

> Insofar as equality drives us, it might be argued that the new rule should be applied to those who had toiled and failed, but whose claims are now precluded by res judicata; and that it should not be applied to those who only exploit others' efforts by litigating in the new rule's wake.
>
> . . . .
>
> As for the putative hangers-on, they are merely asserting a right that the Court has told them is theirs in law, that the Court has not deemed necessary to apply on a prospective basis only, and that is not otherwise barred by state procedural requirements. They cannot be characterized as freeloaders any more than those who seek vindication under a new rule on facts arising after the rule's announcement. Those in each class rely on the labors of the first successful litigant.

Beam, 111 S. Ct. at 2447. In sum, the Superior Court erred as a matter of federal law in refusing to give Tyler Pipe retroactive effect in this case.

C. Washington Does Not Afford Taxpayers Such as the Appellant an Adequate Predeprivation Remedy to Satisfy Federal Due Process, So Digital Is Entitled to Meaningful Backward-Looking Relief.

The second major issue is whether Digital is entitled to a refund of the unconstitutional taxes [p. 12] it paid to Washington. The determining factor is whether Washington law contains a predeprivation remedy that satisfies Fourteenth Amendment Due Process standards. Harper, 113 S. Ct. at 2519 (citing McKesson Corp. v. Florida Alcoholic Beverages & Tobacco Division, supra). As a matter of law, no predeprivation remedy existed under Washington law at the time Digital filed suit, nor does it now. RCW 82.32.180 required Digital to pay the contested tax and then seek a refund through the courts of the allegedly unlawful tax paid. This "pay-now-litigate-later" procedure requires "meaningful backward-looking relief" under the Due Process Clause to rectify the unconstitutional deprivation.

McKesson commands that courts "design a clear and certain remedy which creates in hindsight a nondiscriminatory scheme." See Cambridge State Bank v. James, 514 N.W.2d 565, 568 (Minn.), cert. denied, Minnesota Com'r of Revenue v.

Norwest Bank Duluth, NA., 115 S.Ct. 663 (Dec. 12, 1994) (citing McKesson, 110 S. Ct. at 2251-52). Under this mandate a state has three options: (1) a full refund of the unconstitutional taxes collected, [p. 13] (2) a retroactive tax on taxpayers exempted from the tax, or (3) a combination of the two remedies. McKesson, 110 S. Ct. at 2252-53. Digital's case presents only one option -- a full refund of the unconstitutional B&O taxes it paid because the statute of limitations for assessments (RCW 82.32.050) against other taxpayers has expired for this period, thereby eliminating options (2) and (3).

The Department will undoubtedly argue that the B&O tax credits enacted effective August 12, 1987 (see RCW 82.04.440) satisfy federal due process requirements. However, this will confine Digital "to a lesser remedy," which is forbidden by Harper. See 113 S. Ct. at 2520 (citing McKesson, 110 S. Ct. at 2254-58). The flaw in the Department's argument was made clear by the Supreme Court's latest decision, in the Reich case. There, Georgia had taxed retirement benefits paid by the Federal Government but exempted those paid by the State, until the U.S. Supreme Court held in Davis v. Michigan, 489 U.S. 803, 103 L.

Ed. 2d 891, 109 S. Ct. 1500 (1989), that such a scheme violated the Constitution. After Davis, Georgia repealed its [p. 14] statute but did not offer federal retirees refunds of the unconstitutional taxes they had paid before the Davis decision. In ordering meaningful backward-looking relief (presumably refunds), the Supreme Court stated less than two months ago:

> . . . [U]nder McKesson, Georgia has the flexibility to maintain an exclusively predeprivation remedial scheme, so long as that scheme is "clear and certain." Due process, we should add, also allows the State to maintain an exclusively postdeprivation regime, see, e.g., Bob Jones Univ. v. Simon, 416 U.S. 725, 746-748 . . . (1974), or a hybrid regime. A State is free as well to reconfigure its remedial scheme over time, to fit its changing needs. Such choices are generally a matter only of state law.
>
> But what a State may not do, and what Georgia did here, is to reconfigure its scheme, unfairly, in mid-course -- to "bait and switch," as some have described it. Specifically, in the mid-1980's, Georgia held out what plainly appeared to be a "clear and certain" postdeprivation remedy, in the form of its tax refund statute, and then declared, only after Reich and others had paid the disputed taxes, that no such remedy exists. In this regard, the Georgia Supreme Court's reliance on Georgia's predeprivation procedures was entirely beside the point (and thus error), because even assuming the constitutional adequacy of these procedures -- an issue on which we express no review -- no reasonable taxpayer would have thought that they represented, in light of the apparent applicability of the refund statute, the exclusive remedy for unlawful taxes. See generally Rakowski, Harper and Its Aftermath, 1 Fla. Tax Rev. 445, 474 (1993).

[p. 15] Reich, 115 S. Ct. at 550. This is precisely the effect the 1987 credit law would have on Digital's refund claim. Digital paid B&O taxes to Washington prior to August 12, 1987, pursuant to an unconstitutional scheme. Washington then amended the statute to correct the Commerce Clause violation, but has rejected taxpayers' requests for refunds arguing that taxpayers are entitled only to the credits under the 1987 credit law. Washington thus reconfigured its scheme, unfairly, in mid-course, to "bait and switch," which is precisely what Reich forbids.

V.

CONCLUSION

This case involves a matter of substantial public import, over which this Court should exercise its authority of direct review.

DATED this 31st day of January, 1995.

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No. 62414-3

SUPREME COURT
OF THE STATE OF WASHINGTON

DIGITAL EQUIPMENT CORPORATION,

Plaintiff/Appellant

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Defendant/Respondent

Appeal From Thurston County Superior Court
Honorable Wm. Thomas McPhee

APPELLANT'S OPENING BRIEF

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ASSIGNMENTS OF ERROR

1. The Superior Court erred when it granted a summary judgment dismissing the claim of Plaintiff/Appellant Digital Equipment Corporation ("Digital"), for a refund of Washington Business and Occupation ("B&O") taxes paid between January 1, 1983 and June 23, 1987, and from June 23, 1987 to August 11, 1987. See Order Granting Defendant's Motion for Summary Judgment and Denying Plaintiff's Motion for Reconsideration (Nov. 18, 1994) at 4 (CP 236).

2. The Superior Court erred when it denied Digital's motion for reconsideration. Id.

STATEMENT OF ISSUES

The following issues pertain to the Assignments of Error:

1. Retroactivity of the United States Supreme Court's Ruling in TYLER PIPE INDUSTRIES, INC. V. WASHINGTON DEPARTMENT OF REVENUE, 483 U.S. 232 (1987). Whether, under the federal rule governing retroactivity of U.S. Supreme Court decisions, as established by the Supreme Court's decisions in James Beam Distilling Co. v. Georgia, 501 U.S. 529, 115 L. Ed. 2d 481, 111 S. Ct. 2439 [p. 2](1991), and Harper v. Virginia

Dept. of Taxation, ___ U.S. ___, 125 L. Ed. 2d 74, 113 S. Ct. 2510 (1993), the Superior Court erred in refusing to give retroactive effect to the decision of the Supreme Court in Tyler Pipe Indus., Inc. v. Department of Revenue, 483 U.S. 232, 97 L. Ed. 2d 199, 107 S. Ct. 2810 (1987). (Assignments of Error Nos. 1 & 2.)

2. Meaningful Remedy for Taxpayers Under Washington Law for Taxes Collected in Violation of the U.S. Constitution. Whether Washington law provides a taxpayer like Digital with meaningful relief that satisfies federal due process requirements as established by the Supreme Court's decisions in McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18, 110 L. Ed. 2d 17, 110 S. Ct. 2238 (1990), and Reich v. Collins, ___ U.S. ___, 130 L. Ed. 2d 454, 115 S. Ct. 547 (1994), if Digital is denied a refund of taxes that were collected in violation of the Commerce Clause of the U.S. Constitution. (Assignments of Error Nos. 1 & 2.) [p. 3]

I.

INTRODUCTION

The core issue in this case is whether Plaintiff/Appellant Digital Equipment Corporation ("Digital"), which paid taxes to the State of Washington which should not have been collected because they were prohibited by the Commerce Clause of the U.S. Constitution, is entitled to a refund of those taxes. The taxes in question are Business and Occupation ("B&O") taxes that were struck down by the U.S. Supreme Court in Tyler Pipe v. Department of Revenue, 483 U.S. 232, 97 L. Ed. 2d 199, 107 S. Ct. 2810 (1987) ("Tyler Pipe"), as impermissibly discriminatory against interstate commerce under the Commerce Clause (U.S. Constitution, Article I, Section 8). The Court in Tyler Pipe, however, did not go on to specify the remedy for the taxpayers in that case; instead, consistent with the general principle that the question of relief is properly addressed in the first instance by the state courts, the Supreme Court remanded the case to this Court to decide the "refund issues" raised by its ruling. Tyler Pipe, 483 U.S. at 252. On remand, this Court applied the [p. 4] holding in Tyler Pipe prospectively only, and denied a refund. See National

Can Corp. v. Revenue, 109 Wn.2d 878, 749 P.2d 1286 (1988) ("National Can II"). This Court held that whether Tyler Pipe should be given retroactive effect was governed by the test set forth by the U.S. Supreme Court's decision in Chevron Oil Co. v. Huson, 404 U.S. 97, 30 L. Ed. 2d 296, 92 S. Ct. 349 (1971) ("Chevron Oil"); based on that test, this Court denied a refund.[1] The Supreme Court then declined to review this decision. See order denying the taxpayers' petition for a writ of certiorari, reported at 486 U.S. 1040, 100 L. Ed. 2d 615, 108 S. Ct. 2030 (1988). [p. 5]

After this Court decided National Can II, the U.S. Supreme Court repudiated the Chevron Oil approach and embraced the full retroactivity standard set forth in Griffith v. Kentucky, 479

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[1]"Chevron Oil . . . sets out the three factors to be considered in deciding whether to give retroactive or prospective effect to a new rule in a federal civil case. . . . Courts must (1) determine whether the decision establishes a new principle of law either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed; (2) weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect and whether retrospective operation will further or retard its operation; and (3) weigh the inequity imposed by retroactive application. Chevron Oil, at 106-07." National Can II, 109 Wn.2d at 881.

U.S. 314, 93 L. Ed. 2d 649, 107 S. Ct. 708 (1987). See James Beam Distilling Co. v. Georgia, 501 U.S. 529, 115 L. Ed. 2d 481, 111 S. Ct. 2439 (1991) ("Beam"); Harper v. Virginia Dept. of Taxation, ___ U.S. ___, 125 L. Ed. 2d 74, 113 S. Ct. 2510 (1993) ("Harper"). Moreover, in tandem with the adoption of full retroactivity, the Court held that the Due Process Clause of the Fourteenth Amendment requires a state to provide a meaningful remedy for taxpayers who pay taxes that later are established to violate a constitutional prohibition. See McKesson Corp. v. Division of Alcoholic Beverages, 496 U.S. 18, 110 L. Ed. 2d 17, 110 S. Ct. 2238 (1990) ("McKesson"); Reich v. Collins, ___ U.S. ___, 130 L. Ed. 2d 454, 115 S. Ct. 547 (1994) ("Reich"). In the last of these cases (decided at the start of the October 1994 Term), the Court held that a state cannot avoid the obligation to refund illegally assessed taxes by reconfiguring the remedy in mid-course. Reich, 115 S. Ct. at 550. [p. 6]

In sum, not only is Tyler Pipe to be given retroactive effect, but due process also forbids a state from first requiring a taxpayer to pay a tax under a scheme that provides for full refunds of a tax later declared invalid, and then turning around and

declaring that this remedy no longer exists after the taxpayer has complied with the payment requirement and prevailed in a subsequent court challenge to the assessment's legality. Here, Digital complied with the payment requirements of RCW Chapter 82.32, for taxes declared invalid in Tyler Pipe. Accordingly, the Superior Court erred in denying Digital its refund.

The Washington statute found unconstitutional in Tyler Pipe was former RCW 82.04.440, the "multiple activities exemption." Washington's B&O multiple activities exemption law was originally challenged in 1984. More than eight years have now passed since the U.S. Supreme Court in Tyler Pipe held Washington's B&O tax to be unconstitutional, yet no taxpayer has received a refund of the taxes which Tyler Pipe declared illegally assessed. Beam, Harper, McKesson and Reich, decided by the Supreme Court after this Court's ruling in National [p. 7] Can II, have clarified the federal law on retroactivity and also established the due process requirements for meaningful remedies in successful taxpayer challenges to the constitutionality of state taxes. In light of these decisions, this Court should reverse the judgment of the Superior Court, and order that Digital receive a refund.

II.

STATEMENT OF FACTS

A. Background.

Digital is a Massachusetts corporation which was founded in 1957. (CP 46.) Digital designs, manufactures, sells and services computers, associated peripheral equipment, and related software and supplies. Id. Its products are used worldwide in a wide variety of applications and programs. Id. During the period in question, i.e., January 1, 1983, through August 11, 1987, Digital manufactured all parts, components and products outside the state of Washington and made sales to end-users (consumers), as well as to persons who resold the goods (wholesalers) in this state. (CP 47.)

. . . . [p. 26]

B. Washington Does Not Provide Taxpayers That Pay an Unconstitutional State Tax a Predeprivation Process That Satisfies Federal Due Process Guidelines, and Therefore Washington Must Give Digital a Refund.

Since Tyler Pipe is to be applied retroactively to Digital, the next inquiry is whether Digital is entitled to a refund of the unconstitutional taxes it paid. As shown, Beam and Harper

establish that a U.S. Supreme Court decision shall be given retroactive effect, absent an express reservation by the decision at issue. See Cambridge State Bank v. James, 514 N.W.2d 565, 568 n.5 (Minn.), cert. denied sub nom. Minnesota Comm'r of Revenue v. Norwest Bank Duluth, N.A., ___ U.S. ___, 130 L. Ed. 2d 598, 115 S. Ct. 663 (1994). Digital would agree that, merely because a rule of federal law must be given retroactive effect to invalidate a state tax collection, a taxpayer who successfully challenges that collection is not necessarily entitled to a refund of the illegally collected tax. Instead:

> Harper holds that the existence of a predeprivation remedy which meets the tests set out in McKesson is a preliminary question which determines the remedy required for an unlawful tax under the Due Process Clause of the federal constitution. Harper, --- U.S. at --- 113 S. Ct. at 2519. . . . [A]fter Harper the existence of a meaningful predeprivation [p. 27] remedy is a necessary precondition to denying a retroactive remedy on any state law theory.

Cambridge State Bank, 514 N.W.2d at 569.

McKesson established the approach for determining whether a remedy passes due process muster. As the Court explained in Harper, under McKesson a state must:

> ". . . provide relief consistent with federal due process principles." American Trucking, 496 U.S., at 181, 110 S.

> Ct., at 2332 (plurality opinion). Under the Due Process Clause, U.S. Const., Amdt. 14, § 1, "a State found to have imposed an impermissibly discriminatory tax retains flexibility in responding to this determination." McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18, 39-40, 110 S. Ct. 2238, 2251-2252, 110 L. Ed. 2d 17 (1990). If Virginia "offers a meaningful opportunity for taxpayers to withhold contested tax assessments and to challenge their validity in a predeprivation hearing," the "availability of a predeprivation hearing constitutes a procedural safeguard . . . sufficient by itself to satisfy the Due Process Clause." Id., at 38, n.21, 110 S. Ct., at 2251, n.21. On the other hand, if no such predeprivation remedy exists, "the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation." Id., at 31, 110 S. Ct., at 2247 (footnotes omitted). In providing such relief, a State may either award full refunds to those burdened by an unlawful tax or issue some other order that "create[s] in hindsight a nondiscriminatory scheme." Id., at 40, 110 S. Ct., at 2252. Cf. Davis, 489 U.S., at 818, 109 S. Ct., at 1509 . . .

Harper, 113 S. Ct. at 2519-20. In other words, one must first determine whether the state has chosen [p. 28] to provide taxpayers with a predeprivation or postdeprivation procedure, and then determine whether that procedure satisfies the requirements of due process.[9]

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[9]"A predeprivation procedure must allow taxpayers to sue to enjoin imposition of the tax prior to payment or to withhold payment and present their objections as defenses in a tax (continued...)

Between 1983 and 1987, the period during which Digital seeks a refund, Washington did not provide taxpayers a predeprivation remedy that satisfied Fourteenth Amendment due process standards. The scope of the remedy available in tax cases such as these was set forth in RCW Chapter 82.32 and required a Washington taxpayer to pay a disputed tax and then seek a refund through the courts. Thus, between 1983 and 1987, taxpayers challenging taxes in Washington were required to pay the taxes first and then file for a refund in Superior Court. RCW 82.32.180.[10] This procedure did not provide a [p. 29]

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[9](...continued)
enforcement proceeding. . . . [A] postdeprivation procedure, however, . . . must provide one of the following 'clear and certain' remedies: a refund of taxes unlawfully exacted, a retroactive tax on the benefitted taxpayers, or a combination of a partial refund and a partial retroactive assessment to create "in hindsight a nondiscriminatory scheme." Cambridge State Bank, supra, 514 N.W.2d at 568.

[10]RCW 82.32.150 also provides taxpayers the opportunity to seek injunctions against the state in tax cases involving constitutional claims. But the Department vigorously opposes such requests, and this Court has made such injunctions all but impossible to obtain. See Tyler Pipe Industries v. Department of Revenue, 96 Wn.2d 785, 638 P.2d 1213 (1982). Indeed, this Court has held that a taxpayer seeking an injunction against the state in a tax case based on constitutional grounds must not only
(continued...)

predeprivation remedy to Digital or other taxpayers which satisfied the due process requirements established under McKesson.

Because Washington did not provide a meaningful predeprivation remedy to taxpayers, Washington is now required by McKesson to provide a constitutional postdeprivation remedy, i.e., [p. 30] "meaningful backward-looking relief," to rectify the unconstitutional deprivation. McKesson, 496 U.S. at 31. McKesson further directs that a "meaningful backward-looking remedy" requires "a clear and certain remedy which creates in

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[10](...continued)
satisfy RCW 82.32.150, but must also meet the equitable criterion governing an injunction's issuance because "injunctive relief will not be granted where there is a plain, complete, speedy and adequate remedy at law" and Washington law "provides the legal remedy of a refund suit." Id. at 791.

Washington also has an administrative procedure for contesting tax assessments without first paying the contested taxes (see RCW 82.32.160 and WAC 458-20-100) but administrative bodies cannot rule on the constitutionality of statutes. See Yakima County Clean Air Authority v. Glascam Builders, Inc., 85 Wn.2d 255, 534 P.2d 33 (1975). Thus, an administrative hearing process does not provide taxpayers the "meaningful opportunity" to challenge a tax assessment in court prior to paying the disputed taxes as required by McKesson. Moreover, paying the contested taxes prior to filing a refund suit in Thurston County Superior Court is a statutory prerequisite to having the case heard outside the Department's administrative hearing process.

hindsight a nondiscriminatory scheme" and rectifies the unconstitutional deprivation involved. Cambridge State Bank, 514 N.W.2d at 571 (citing McKesson).[11] Under McKesson, the state has three options: (1) a full refund of the unconstitutional taxes collected, (2) a retroactive tax on taxpayers exempted from the tax, or (3) a combination of the two remedies. McKesson, 496 U.S. at 40-41. For Digital, the only option remaining is a full refund of the unconstitutional B&O taxes it paid between January 1, 1983 and August 11, 1987, because the statute of limitations for assessments against [p. 31] other taxpayers has expired for this period, thereby eliminating options (2) and (3). See RCW 82.32.050.

Nor will the 1987 credit law permit the State to avoid giving Digital a refund. The Due Process Clause requires this

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[11]In Cambridge State Bank, the Minnesota State Supreme Court held that Minnesota had not afforded banks a predeprivation remedy sufficient to satisfy the McKesson federal due process standards, because the question of whether a Minnesota taxpayer could pose a constitutional challenge to a state tax without first paying the contested tax was unsettled at the time the banks filed their suit. The Court thus concluded that, at the time the banks initiated their suit, the only certain remedy available to taxpayers was the tax refund statute under which they proceeded.

Court to fashion a remedy which satisfies "minimum federal requirements." McKesson, 496 U.S. at 50-51. And while a state "is free . . . to provide broader relief as a matter of state law than is required by the Federal Constitution," id. at 52 n.36, "under no circumstances may [a state] confine [taxpayers] to a lesser remedy" than the Constitution would afford. Harper, 113 S. Ct. at 2520 (citing McKesson) (emphasis supplied). Any argument that the B&O tax credits established under the 1987 credit law satisfy federal due process requirements fails to acknowledge that the 1987 credit law confines Digital to "a lesser remedy" which is forbidden by both Harper and McKesson.

This conclusion is compelled by the Supreme Court's recent decision in Reich. The Georgia Supreme Court had held that Georgia could tax retirement benefits paid by the Federal Government, [p. 32] but exempt those paid by the State. The U.S. Supreme Court then held that such a scheme violated the Constitution, and remanded the matter to the Georgia courts to determine the appropriate remedy. Georgia then repealed the statute but did not offer federal retirees refunds of the

unconstitutional taxes they had paid before the Court's decision.

The retirees appealed, and the Supreme Court held:

> . . . [U]nder McKesson, Georgia has the flexibility to maintain an exclusively predeprivation remedial scheme, so long as that scheme is "clear and certain." Due process, we should add, also allows the State to maintain an exclusively postdeprivation regime, see, e.g., Bob Jones Univ. v. Simon, 416 U.S. 725, 746-748, 94 S. Ct. 2038, 40 L. Ed. 2d 496 (1974), or a hybrid regime. A State is free as well to reconfigure its remedial scheme over time, to fit its changing needs. Such choices are generally a matter only of state law.
>
> But what a State may not do, and what Georgia did here, is to reconfigure its scheme, unfairly, in mid-course -- to "bait and switch," as some have described it. Specifically, in the mid-1980's, Georgia held out what plainly appeared to be a "clear and certain" postdeprivation remedy, in the form of its tax refund statute, and then declared, only after Reich and others had paid the disputed taxes, that no such remedy exists. In this regard, the Georgia Supreme Court's reliance on Georgia's predeprivation procedures was entirely beside the point (and thus error), because even assuming the constitutional adequacy of these procedures -- an issue on which we express no view -- no reasonable taxpayer would have thought that they represented, in light of the apparent [p. 33] applicability of the refund statute, the exclusive remedy for unlawful taxes. See generally Rakowski, Harper and Its Aftermath, 1 Fla. Tax Rev. 445, 474 (1993).

Reich, 115 S. Ct. at 550.

This is the precise effect which would result from limiting Digital's remedy to the 1987 credit law. Between 1983 and 1987,

Digital paid B&O taxes to Washington pursuant to an unconstitutional scheme. During these years, Washington held out a "clear and certain" postdeprivation remedy -- its tax refund statute (RCW 82.32.060). But after other taxpayers paid the disputed taxes and successfully challenged them in Tyler Pipe, the Legislature passed the 1987 credit law and declared that no refund remedy existed. Under Reich, application of the 1987 credit law to Digital would constitute an attempt by Washington to reconfigure its scheme, in mid-course -- in short, an unconstitutional "bait and switch" of the sort condemned in Reich.

C. The Superior Court's Refusal to Give Retroactive Effect to TYLER PIPE Disregards the Vital Federal Interest in Preventing Discrimination Against Interstate Commerce by State Tax Statutes.

The last decade has seen the U.S. Supreme Court strike down as unconstitutional an almost . . . .

. . . .

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. . . . [p. 10]

B. The United States Supreme Court Has Consistently Given the Retroactivity Rule Announced in Harper a Broad Application, as Shown by Its Most Recent Rulings.

In its most recent rulings, the U.S. Supreme Court continues to give the retroactivity rule of Harper a broad application. See Reynoldsville Casket Co. v. Hyde, 514 U.S. ___, 131 L. Ed. 2d 820, 115 S. Ct. 1745 (1995); Ryder v. U.S., __ U.S. ___, 132 L. Ed. 2d 136, 115 S. Ct. 2031 (1995).[6] Reynoldsville is particularly relevant. In that case, plaintiff attempted to bring a negligence action against an out-of-state defendant based on an automobile accident which had occurred more than three years earlier. At the time of the accident, Ohio's statute of limitations for personal injury actions was two years but

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[6]In Reynoldsville, Justice Breyer authored the majority opinion and was joined by Justices Rehnquist, Scalia, Souter, Thomas and Ginsberg. Justice Scalia, joined by Justice Thomas, authored a concurring opinion as did Justice Kennedy, joined by Justice O'Connor. The Department's extended and intricate exercise in "footnote prophecy" concerning how Justice Scalia and others will vote concerning Harper (and how they would have voted had certiorari been granted in National Can II) has been discredited by the actual votes taken in the most recent of these cases. See Brief of Respondent at 27, n.28.

the statute was tolled for claims against out-of-state defendants. 131 L. Ed. 2d at 825. While plaintiff's action was pending, the U.S. Supreme Court in Bendix Autolite Corp. v. Midwesco Enterprises, Inc., 486 U.S. 888, 100 L. Ed. 2d 896, 108 S. Ct. 2218 (1988), declared that the Ohio tolling provision placed an unconstitutional burden on interstate commerce. The trial court dismissed the plaintiff's action; the Ohio Supreme Court then reinstated it, ruling that Bendix could not be retroactively applied to actions arising before the Bendix decision. Id. [p. 11]

The U.S. Supreme Court reversed the Ohio court's prospective application of the rule in Bendix as a violation of the Constitution's Supremacy Clause (art. VI, § 2). The plaintiff argued that the issue was not one of retroactivity, and that the Ohio Supreme Court was merely exercising "a degree of legal leeway in fashioning remedies for constitutional ills." Reynoldsville, 131 L. Ed. 2d at 826. The plaintiff further argued that Chevron Oil should still be applied by recharacterizing it as a case in which the Court took reliance interests into account in fashioning an appropriate remedy for a violation of a federal law. Id.

The Court, however, held that the Ohio Supreme Court could not change the legal outcome dictated by the Supremacy Clause in Bendix by calling its refusal to give retroactive effect to the federal law an effort to provide a remedy. The Court also rejected the invitation to revive Chevron Oil by broadly distinguishing between retroactivity and remedies:

> One serious problem with Hyde's argument lies in the Ohio Supreme Court's legal description of why, in fact, it refused to dismiss Hyde's case. As we have pointed out, the Ohio Supreme Court's syllabus (the legally authoritative statement of its holding) speaks, not about remedy, but about retroactivity. Regardless, we do not see how, in the circumstances before us, the Ohio Supreme Court could change a legal outcome that federal law, applicable under the Supremacy Clause, would otherwise dictate simply by calling its refusal to apply that federal law an effort to create a remedy. The Ohio Supreme Court's justification for refusing to dismiss Hyde's suit is that she, and others like her, may have reasonably relied upon pre-*Bendix* law -- a reliance of the same kind and degree as that involved in *Chevron Oil*. But, this type of justification -- often present when prior law is overruled -- is the very sort that this Court, in *Harper*, found insufficient to deny retroactive application of a new legal rule (that had been applied in the case that first announced it). If *Harper* has anything more than symbolic significance, how could virtually identical reliance, without more, prove sufficient to permit a virtually identical denial [p. 12] simply because it is characterized as a denial based on "remedy" rather than "non-retroactivity"?

Reynoldsville, 131 L. Ed. 2d at 826, 827 (emphasis supplied).

Finally, the Court rejected the invitation to grant wide latitude to state courts within the area of remedies. Elaborating on its decision in McKesson, the Court explained that where a violation involved the different treatment of two similar classes of individuals under state tax laws, a state could cure the problem by either taxing both groups (i.e., imposing back taxes on the previously advantaged group), or by taxing neither (and refunding back taxes to the disadvantaged group), such as was the case in Davis. Although the state would not have to refund taxes in the first situation, "[t]hat result flows not from some general 'remedial' exception to 'retroactivity' law, but simply from the fact that the state law that the taxpayer had attacked now satisfies the Constitution." Reynoldsville, 131 L. Ed. 2d at 828. Moreover, the Court went on to state that, if a state collects taxes under a taxing statute which is later held by the U.S. Supreme Court to be unconstitutional, the retroactive application of the Court's ruling would entitle taxpayers to a refund of the taxes illegally paid; the Court then indicated that a refund could be refused only under a preexisting, independent rule of state law which has nothing to do

with retroactivity and which also satisfied procedural due process requirements. Id. at 828-29.[7] [p. 13]

In short, Reynoldsville confirms that Chevron Oil no longer constitutes a viable statement of retroactivity law in civil cases. Reynoldsville is also directly applicable to this case. Both in Reynoldsville and this case, the issue is the retroactive application of a new rule of federal law. This Court cannot change the legal outcome dictated by the Commerce Clause in Tyler Pipe by calling its refusal to retroactively apply the rule a remedy, any more than could the Ohio Supreme Court in Reynoldsville change the legal outcome dictated by the Supremacy Clause in Bendix. Finally, Reynoldsville clearly warns that, if a state collects taxes under a taxing statute later held by the U.S. Supreme Court to be unconstitutional, the rule of law is to be applied retroactively such that the remedy of a refund may only be refused under very limited circumstances. As is discussed below, the only alternative

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[7]Between 1983 and 1987, the only remedy available to taxpayers in Washington who paid an unconstitutional tax, was a full refund of those taxes paid. RCW 82.32.060; see RCW 82.32.170 & .180. The 1987 Credit Law, came into existence on August 12, 1987, and for reasons directly related to this Court's decision in Tyler Pipe.

basis urged by the Department for refusing a refund to Digital -- retroactive application of the 1987 Credit Law -- does not qualify as one of those circumstances.

C. Recent Decisions of the Lower Federal Courts Follow the Rule in Harper and Require the Retroactive Application of New Rules of Federal Law.

The Department claims that the lower federal courts have not understood Harper to have adopted the express reservation test, citing Holt v. Shalala, 35 F.3d 376 (9th Cir. 1994), and Pettijohn v. Shalala, 23 F.3d 1572 (10th Cir. 1994) (per curiam). In Holt, a three-judge panel of the . . . .

. . . . [p. 16]

U.S. v. Real Property, at 1405-06 (emphasis supplied).[8]

Thus, contrary to the Department's claim, lower federal courts have recognized that the federal retroactivity rule in Harper effectively abrogated Chevron Oil. These decisions are in accord with Digital's conclusion that the only time a decision might apply

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[8]The U.S. Supreme Court in Tyler Pipe similarly remanded the matter to this Court for the application of its holding to the taxpayers in that case.

"purely prospectively" is when the U.S. Supreme Court expressly reserves the question, which it did not do in Tyler Pipe.

D. Digital Is Entitled to a Refund of All B&O Taxes Illegally Collected Between January 1, 1983, and August 11, 1987.

1. Due Process Mandates Digital Be Provided Meaningful Backward-Looking Relief, Which in This Case Is a Refund of All Unconstitutional Taxes Paid. Digital recognizes that retroactive application of Tyler Pipe does not automatically result in a refund of the illegally collected tax. Rather, as stated by the Court in Harper (citing the approach established in McKesson), retroactive application of Tyler Pipe requires the fashioning of a remedy which provides relief consistent with due process principles.

The Department argues that the "[r]etroactive application of the 1987 Credit Law to the interim period provides Digital Equipment all the relief federal due process requires." Brief of Respondent at 18. The Department further argues that McKesson allows the state to retain the taxes levied upon Digital during the interim period because the 1987 Credit Law lawfully deprived Digital of its property pursuant to a tax [p. 17] scheme (the 1987

Credit Law) that is valid under the Commerce Clause. Brief of Respondent at 18, 19. In support of this position, the Department quotes the following portion of McKesson:

> [A] State found to have imposed an impermissibly discriminatory tax retains flexibility in responding to this determination. Florida may reformulate and enforce the Liquor Tax during the contested tax period *in any way that treats petitioner and its competitors in a manner consistent with the dictates of the Commerce Clause*. Having done so, *the state may retain the tax appropriately levied upon petitioner pursuant to this reformulated scheme* because this retention would deprive petition of its property pursuant to a tax scheme *that is valid under the Commerce Clause*. 496 U.S. at 39-40.

Brief of Respondent at 18 (quoting McKesson, 496 U.S. at 39-40) (retaining edits and emphasis of the Department).

The Department misreads McKesson. While it is true the state has a degree of flexibility to respond to the announcement of a new federal rule, including the reformulation of the offending tax law, the enforcement of that law must treat the taxpayer and its competitors "in a manner consistent with the dictates of the Commerce Clause." Id. In this case, the retroactive application of the 1987 Credit Law will do nothing to change the fact that

Digital paid the unconstitutional B&O tax while its competitors did not.[9]

The retroactive application of the 1987 Credit Law to Digital would therefore continue to treat Digital and its in-state competitors in a [p. 18] manner inconsistent with the dictates of the Commerce Clause. In other words, Digital would remain burdened with the tax under the 1987 Credit Law while its competitors would remain unburdened. See Reynoldsville, 131 L. Ed. 2d at 838. Harper mandates that under no circumstances may a state confine payers of an unconstitutional tax to a lesser remedy in fashioning postdeprivation relief. 113 S. Ct. at 2510.[10] Hence,

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[9]Under former RCW 82.04.440, instate manufacturers received an "automatic" exemption from the retailing or wholesaling B&O taxes, whereas out-of-state manufacturers (like Digital) did not. The Department's argument would require Digital to apply for credits to equalize the tax disparity. No such requirement is placed on instate manufacturers because they continue to benefit from the unconstitutional exemption granted by former RCW 82.04.440.

[10]This disparity in treatment was also recognized by this Court in American National Can, supra. The court acknowledged that taxpayers had applied for $1,304,000 worth of credits under the 1987 Credit Law which was "a small fraction" of the total tax the state collected from interstate manufacturers, but the court dismissed this inequality stating "[t]axpayers' argument can only be understood as a complaint about the magnitude of the effect."

(continued...)

the discrimination continues and Digital would clearly be confined to a lesser remedy should it be limited to the relief afforded by the 1987 Credit Law.[11] The Constitution simply does not permit such a result.

The Department also omits the paragraph which follows the section of McKesson on which it relies and quotes. There, the Court goes on to explain:

> More specifically, the State may cure the invalidity of the Liquor Tax by refunding to petitioner the difference between the tax it paid and the tax it would have been assessed were it extended the same rate reductions that its competitors actually received. Cf. Montana National Bank and Bennett (curing discrimination through such refunds). Alternatively, to the extent consistent with other constitutional restrictions, the State may assess and collect back [p. 19] taxes from petitioner's competitors who

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[10](...continued)
Id. at 246-47. The "magnitude of the effect" is, however, very relevant under McKesson in light of Harper; in other words, a state cannot refuse a refund just because the result would only be "a little bit" unconstitutional.

[11]In fact, as discussed more fully below, Digital is not even eligible for relief under the 1987 Credit Law by the plain terms of that law. The U. S. Supreme Court, and only the U. S. Supreme Court, can issue the necessary "judgment not subject to review" holding that retroactive relief is appropriate under Tyler Pipe; as this Court is well aware, the U.S. Supreme Court has never issued such a ruling which means the law, by its terms, affords no relief to Digital. See § II.D.2, infra at 20-23.

> benefitted from the rate reductions during the contested tax period, calibrating the retroactive assessment to create in hindsight a nondiscriminatory scheme. Cf. Bennett, 284 US, at 247, 76 L Ed 265, 52 S Ct 133 (suggesting State could erase the unconstitutional discrimination by "collecting the additional taxes from the favored competitors"). Finally, a combination of a partial refund to petitioner and a partial retroactive assessment of tax increases on favored competitors, so long as the resultant tax actually assessed during the contested tax period reflects a scheme that does not discriminate against interstate commerce, would render petitioner's resultant deprivation lawful and therefore satisfy the Due Process Clause's requirement of a fully adequate postdeprivation procedure.

McKesson, 496 U.S. at 40-41 (emphasis supplied). The 1987 Credit Law does not satisfy this test.

In addition, the Department's interpretation of McKesson is inconsistent with the U.S. Supreme Court's recent decision in Reynoldsville. In Reynoldsville, the Court explained the "special circumstances of the tax cases":

> Where the violation depends, in critical part, upon differential treatment of two similar classes of individuals, then one might cure the problem either by similarly burdening, or by similarly unburdening, both groups. Where the violation stemmed from, say, taxing the retirement funds of one group (retired Federal Government employees) but not those of another (retired state government employees), see *Davis v. Michigan Dept. of Treasury*, 489 US 803, 103 L Ed 2d 891, 109 S Ct 1500 (1989), then the State might cure the problem either (1) by taxing both (imposing, say, back taxes on the previously

> advantaged group, to the extent constitutionally permissible), or (2) by taxing neither (and refunding back taxes). Cf. *McKesson Corp., supra*, at 40-41 and n 23, 110 L Ed 2d 17, 110 S Ct 2238. And, if the State chooses the first, then the taxpayers need receive no refund. But, that result flows not from some general "remedial" exception to "retroactivity" law, but simply from the fact that the state law that the taxpayer had attacked now satisfies the Constitution.
>
> . . . .
>
> But what if a pre-existing, separate, independent rule of State law, having nothing to do with retroactivity -- a rule containing certain [p. 20] procedural requirements for any refund suit -- nonetheless barred the taxpayers' refund suit. See *McKesson Corp., supra*, at 45, 110 L Ed 2d 17, 110 S Ct 2238; *Reich* v. *Collins*, 513 U.S. ___, ___, 130 L Ed 2d 454 115 S Ct 54 (1994). Depending upon whether or not this independent rule satisfied other provisions of the Constitution, it could independently bar the taxpayers' refund claim.

131 L. Ed. 2d at 828-29 (citations omitted in part).

In short, Reynoldsville has extended Reich v. Collins, by indicating that the Due Process Clause limits the ability of a state to substitute one remedy for another by requiring neutrality and independence in effecting that substitution. Put another way, a state fails the Reich/Reynoldsville approach if it effects the substitution "after the fact" to avoid having to pay a refund. As

will now be shown, retroactive application of the 1987 Credit Law cannot pass muster under this test.

2. **Despite the Holding in AMERICAN NATIONAL CAN, the 1987 Credit Law Cannot Be Applied Retroactively to Digital**. The Department relies heavily on certain statements by this Court in American National Can to justify the state's refusal to provide Digital a refund of the unconstitutional taxes it paid. Specifically, the Department cites this Court's reference to section 3 of the 1987 Credit Law which states:

> If it is determined by a court of competent jurisdiction, in a judgment not subject to review, that relief is appropriate for any tax reporting periods before the effective date of this act, in respect to RCW 82.04.440 as it existed before the effective date of this act, it is the intent of the legislature that the credits provided in RCW 82.04.440 as amended by section 2 of this act shall be applied to such reporting periods and that relief for such periods be limited to the granting of such credits.

Laws of 1987, 2d Ex. Sess., ch. 3, § 3; see American National Can at 250, 251. [p. 21]

Although included as section 3 in the bill, this section was not codified as part of the 1987 Credit Law. Instead, this language appeared in the Code Reviser's notes as part of the legislative findings and intent. Closer review, however, discloses that this

language is actually a legislative "statement of desire" that taxpayers never receive any credits for unconstitutional taxes paid prior to the effective date of the 1987 Credit Law -- unless the U.S. Supreme Court at some future time issues a decision requiring relief under Tyler Pipe for a tax reporting period prior to the issuance of the decision in Tyler Pipe. Since the only "court of competent jurisdiction" which can issue "a judgment not subject to review" is the U.S. Supreme Court, only a decision by the U.S. Supreme Court can trigger application of the credit law to prior tax reporting periods.[12]

In other words, application of the 1987 Credit Law to prior tax reporting period taxpayers would be triggered only if the U.S. Supreme Court granted a petition for a writ of certiorari to review a decision of this Court, and then held that Tyler Pipe applied to prior reporting periods. The effect of that contingency is to deprive a refund to prior reporting period taxpayers. Given the well-known fact that in 1987 the Supreme [p. 22] Court was

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[12]This Court has, of course, recognized that the U.S. Supreme Court has the final review authority over all state court decisions touching upon federal rights. State v. Chrisman, 100 Wn.2d 814, 676 P.2d 419 (1984).

granting "cert" petitions in under five percent of cases,[13] the only fair conclusion to draw from the Legislature's very precise language is that it : (1) expected this Court to hold that Tyler Pipe would not be given retroactive effect; (2) also expected that the U.S. Supreme Court would then deny a petition for a writ of certiorari to review that decision; and therefore (3) adopted the retroactive application "statement of desire" as an "insurance policy" against the risk of a refund in the unlikely event the Court granted review and required that Tyler Pipe be retroactively applied.[14] To date, the Legislature's gamble has paid off -- there

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[13]R. Stern, E. Gressman & S. Schapiro, Supreme Court Practice, § 4.1 at 190, n.7 (6th ed. 1986) ("In recent years, about 95 percent of the petitions for certiorari are denied, with the proportion of denials steadily increasing"). It is fair to say that the very long odds for getting U.S. Supreme Court review is one of the few things concerning Supreme Court practice about which the educated lay public is aware.

[14]It should be noted that the denial of certiorari by the U.S. Supreme Court would also be considered a "judgment not subject to review" which would bring into play the contingencies set forth in the "statement of desire." In other words, the Department would undoubtedly take the position that if the U.S. Supreme Court denies certiorari with regard to this case, that denial would be a judgment not subject to review and Digital and other taxpayers would therefore not be entitled to the credits provided in RCW 82.04.440 under the 1987 Credit Law. This ruling would

(continued...)

has yet to be a U.S. Supreme Court decision requiring retroactive application of Tyler Pipe. This also means that, under the plain language of the statute, Digital is not even eligible for the "remedy" which the 1987 Credit Law provides. E.g., Western Petroleum Importers, Inc. v. Friedt, Washington Supreme Court Cause No. 62771-1 (August 10, 1995) at 2.

In short, the 1987 Credit Law, as evidenced by the Legislature's "statement of desire", is a variant of the "bait and switch" tactics [p. 23] condemned by the U.S. Supreme Court in Reich v. Collins, ___ U.S. ___, 130 L. Ed. 2d 454, 115 S. Ct. 547 (1994). In Reich, the Court held that Georgia could not ". . . hold out what plainly appeared to be [a] clear and certain postdeprivation remedy and then declare, only after the disputed taxes were paid, that no such remedy existed." Reich, 115 S. Ct. at 547.[15] Since Reich, the Court in Reynoldsville expressed

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[14](...continued)
then be res judicata and arguably cut off all claims of similarly situated litigants.

[15]Reich is a unanimous decision authored by Justice O'Connor, who authored the dissent in Harper. The Department's attempts to predict the course of jurisprudence on federal retroactivity law (continued...)

strong presumptive reservations about any after-the-fact attempt to take away a refund and substitute some other -- lesser -- remedy. Here, the credit law clause on which the Department relies is only triggered by a decision of the U.S. Supreme Court holding that Tyler Pipe must be given retroactive effect -- precisely the sort of tactic condemned by Reich and Reynoldsville. In light of these latter two cases, nothing in American Can (which did not even involve a claim for relief from taxes paid prior to Tyler Pipe) warrants giving retroactive application of the credit law.

E. The Superior Court Properly Struck the Affidavit Filed by the Department in Response to Digital's Motion for Reconsideration.

The Department claims the trial court erred by striking an affidavit filed by the Department in response to Digital's reconsideration motion. In Estate of Jordan v. Hartford Acc. & Indem. Co., 120 Wn.2d 490, 844 P.2d 403 (1993), this Court held it will normally not review any issues not presented in the petition for review or the answer. 120 Wn.2d at 496. . . .

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[15](...continued)
(see Respondent's Brief at 27, n.28) also does not address the evolution of Justice O'Connor's philosophy in this area.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

DIGITAL EQUIPMENT CORPORATION,	)
	)
Plaintiff,	)
v.	)
	)
STATE OF WASHINGTON, DEPARTMENT OF REVENUE,	)
	)
	)
Defendant.	)
	)

CERTIFIED TRANSCRIPT OF
VIDEOTAPED PROCEEDINGS

OCTOBER 27, 1995

ORAL ARGUMENTS

FOR THE PLAINTIFF, MICHAEL KING

FOR THE DEFENDANT, DONALD COFER, AAG

[FURTHER EXTRACTS FROM TRANSCRIPT,
SUPPLEMENTING THOSE TO BE FOUND
IN APPENDIX TO PETITION FOR
WRIT OF CERTIORARI,
AT 69a-74a]

. . . . [P. 12]

. . . [MR. KING] here and had said in, say, 1989 or 1990, we want you to voluntarily dismiss your suit, and when Digital refused that, if the Department had brought a motion -- that actually happened, we were asked to voluntarily dismiss our suit. We declined because we knew that the McKesson case was pending and American Trucking v. Smith was pending. We wanted to see the outcome of those cases.

But the Department could have gone into court the next day, filed a motion to dismiss, we probably would have gone down in flames, and that would have been the end of the matter. Then our situation would be like all of those other cases that the Department discusses, the post-Digital filing cases that have been finally disposed of. But that's the whole point, they have been finally disposed of. They're not similarly situated cases.

Now --

JUSTICE PEKELIS: What about the remedy question in light of your particular non-double payment of tax?

MR. KING: Well, in light of our particular non-double payment of tax, the question becomes whether somehow that

means that you can say that the Chevron Oil rule can be given effect on the remedy side and we can be deprived of a refund because we didn't pay a double tax.

Again, I say that ignores the discrete injury that we had money taken away from us, our money that was [p. 13] collected in violation of law. There was not proper authority to collect that tax.

Now, the United States Supreme Court has laid out that the due process clause imposes an independent duty to refund under those circumstances, unless, unless, and there are three exceptions.

The first exception is if the state provided an alternative pre-deprivation remedy to the --

JUSTICE TALMADGE: Counsel, before you go through that.

MR. KING: Yes.

JUSTICE TALMADGE: In this particular circumstance, the litigants had actually litigated Tyler Pipe who paid the double tax that was found to be violative of the commerce clause. They didn't get a refund. They got the remedy that was provided for them by the legislature. The remedy was challenged on

constitutional grounds and upheld. Doesn't that mean that the only remedy that you can seek, even if Tyler Pipe is retroactive to your circumstance, is exactly the remedy everybody else got?

MR. KING: No, Your Honor, because in American National Can II, the challenge was on state and federal grounds. The federal grounds were not the federal grounds that were being advanced here. The claimants did not come into court and say, the retroactivity law has changed.

. . . . [p. 18]

. . . [MR. KING] yet been made by the United States Supreme Court, because it has not issued that judgment, and therefore the condition precedent has not been satisfied. But even if you determine that state law means the credit law as a matter of state law applies, you have a federal law problem.

I know I'm going a little bit over into my time, but I want to get directly to this point. Your federal law problem is a due process one. Because, as Reynoldsville makes clear, you may not kick out after the fact a refund unless you do it under a preexisting, separate and independent rule of state law having nothing to do with retroactivity. And, Your Honors, this is the

antithesis of it. This is an after-the-fact law. It was adopted after Digital paid its taxes.

This is not a separate and independent rule having nothing to do with retroactivity. The Department's whole argument is that if you give Digital retroactive effect, the credit law kicks in and suddenly the refund rug is pulled out from under us. I submit that is precisely the sort of reconfiguration in midstream, . . . precisely the sort of bait and switch that was condemned in Reich v. Collins.

Your Honors, our injury is the deprivation of our property without due process of law because this tax was [p. 19] collected illegally. We ask that you reverse and remand for the determination of the appropriate amount of the refund.

And I will reserve the balance of my time.

CHIEF JUSTICE DURHAM: Thank you, Counsel.

MR. COFER: Good morning, Chief Justice Durham, Members of the Court. I am Donald Cofer, Assistant Attorney General. I'm here representing the State of Washington this morning.

First of all, I wish to give the Court a brief overview as to why the judgment of the Superior Court should be affirmed in this

case. I will then discuss the issues involved in the second refund period Digital Equipment has sought refunds for. And, finally, I will discuss the first refund period and the issues involved in that.

Digital Equipment, here this morning, is seeking full refunds of all wholesaling and retailing taxes it paid during two tax periods. The first is from January 1st of 1983, until June 23rd of '87. The second period is from June 23rd of '87 to 8/11/87.

Now, the relief that Digital Equipment is seeking for those periods is barred by the combined effect of two previous decisions of this Court, National Can II on remand from Tyler Pipe, and American National Can. Both . . . .

. . . .

WAC 458-20-228

. . . .

(8) **Stay of collection.** RCW 83.32.200 provides, "When any assessment or additional assessment (of taxes) has been made, the taxpayer may obtain a stay of collection, under such circumstances and for such periods as the department may by general regulation provide, of the whole or any part thereof, by filing with the department a bond in an amount, not exceeding twice the amount on which stay is desired, and with sureties as the department deems necessary, conditioned for the payment of the amount of the assessments, collection of which is stayed by the bond, together with the interest thereon at the rate of one percent of the amount of such assessment for each thirty days or portion thereof from the due date until paid."

(Note: RCW 82.32.190 authorizes issuance of an order by the department holding in abeyance tax collection during pendency of litigation. Such tax might be that due on excise tax returns or tax due for unaudited periods for which no assessment has been issued. If, however, an assessment has been issued and is unpaid, RCW 82.32.200, not RCW 82.32.190, is the operative statute for stay of collection with respect to such an assessment.)

(a) The department will give consideration to a request that it grant a stay of collection if:

(i) Written request for the stay is made prior to the due date for payment of the tax assessment, and

(ii) Payment of any unprotested portion of the assessment and other taxes due is timely made, and

(iii) The requested stay is accompanied by an offer of a cash bond, or the offer of a security bond, the conditions of which are guaranteed by a specified authorized surety insurer; in either case the amount of the bond will ordinarily be set in an amount equal to the assessment or portion thereof for which stay

is requested together with interest thereon at the rate of one percent per month, but in appropriate cases the department may require a bond in an increased amount not to exceed twice the amount for which stay is requested.

(b) The department will grant a stay of collection only when it is satisfied and determines that it is in the best interests of the state to do so. Factors which it will consider in making this determination include: The existence of 1. a constitutional issue to be litigated by the taxpayer the resolution of which is uncertain; 2. a matter of first impression for which the department has little precedent in administrative practice; and 3. an issue affecting other similarly situated taxpayers for whom the department would be willing to stay collection of the tax.

(c) Claims of financial hardship or threat of litigation are not grounds which would justify the granting of a stay of collection. However, the department will consider a claim of significant financial hardship as grounds for staying collection procedures, but this will be done only if a partial payment agreement is executed and kept in accordance with the department's procedures and with such security as the department deems necessary.

(d) If the department grants a stay of collection, the stay will be for a period of no longer than two calendar years from the date of acceptance of the taxpayer request therefor or thirty days following a decision not appealed from by a tribunal or court of competent jurisdiction upholding the validity of the tax assessed, whichever date occurs first. The department may extend the period of a stay originally granted, but only for good cause shown.

. . . .

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THURSTON COUNTY

AMERICAN NATIONAL CAN CORPORATION, et al.,	)	
Plaintiffs,	)	NO. 88-2-00680-3
vs.	)	ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION
STATE OF WASHINGTON, DEPARTMENT OF REVENUE, and WILLIAM R. WILKERSON,	)	
Defendants.	)	

THIS MATTER came on regularly for hearing before the Honorable Paula Casey, Judge of the Superior Court, on May 12 and May 19, 1988 on the motion of the plaintiffs for a preliminary injunction.

The plaintiffs, American National Can Corporation, et al. were represented by BOGLE & GATES, by James R. Johnston. The defendant, State of Washington, Department of Revenue, was represented by KENNETH O. EIKENBERRY, Attorney General, and William B. Collins, Assistant Attorney General.

The Court, having considered the pleadings and affidavits and having heard the arguments of counsel and having [p. 2] entered Findings of Fact and Conclusions of Law, and being fully advised now makes its Order as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Motion of the plaintiff for preliminary injunction is denied.

DATED this 23rd day of May, 1988.

/S/
PAULA CASEY, JUDGE

Presented by:

/S/
William B. Collins
Assistant Attorney General
Attorney for Defendants

Approved as to Form;
Notice of Presentation
Waived:

Approved Via Telephone 5/23/88
/S/ Wm. B. Collins
James R. Johnston
Attorney for Plaintiffs

THE SUPREME COURT OF WASHINGTON

AMERICAN NATIONAL CAN CORPORATION, et al.,	)	
Petitioners,	)	No. 55180-4
v.	)	RULING DENYING MOTION FOR DISCRETIONARY REVIEW
STATE OF WASHINGTON, DEPARTMENT OF REVENUE, et al.,	)	
Respondents.	)	

In an action pending in Thurston County Superior Court, American National Can Corporation and more than 70 other companies doing business in Washington have challenged the present version of this state's business and occupation tax on the ground that it unconstitutionally discriminates against interstate commerce. The plaintiffs below now seek direct discretionary review of a Superior Court decision denying their motion for a preliminary injunction. I conclude that the request must be denied.

The specific relief which the petitioners requested of the trial court was that they be permitted to pay disputed B & O taxes into an escrow. Pointing to this court's recent decision in

National Can Corp. v. Department of Revenue, 109 Wn.2d 878, 749 P.2d 1286 (1988), cert. den. ___ U.S. ___ (June 6, 1988) (National Can II), they urge that this payment device is necessary to protect their right to a tax refund, should their challenge to the tax ultimately prove successful. Without this protection, they fear, the State will spend the tax receipts and [p. 2] in so doing create a "hardship" with which to justify a prospective application only of any decision invalidating the tax.

Petitioners' argument is not without attraction as a matter of apparent fairness. As they recognize, however, to be entitled to the equitable relief of a preliminary injunction against the collection of a tax they must meet a well-established three-part test.[1] They must demonstrate: a clear legal or equitable right, a well-grounded fear of immediate invasion of that right, and actual and substantial injury which would result from the invasion. Tyler Pipe Industries, Inc. v. Department of Revenue, 96 Wn.2d 785, 638 P.2d 1213 (1982). The trial court here found that, as to taxes due under the present B & O tax scheme, the petitioners had not

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[1]Petitioners concede that the escrow proposal would be a species of preliminary injunction.

satisfied the first of these requirements because they are unlikely to prevail on the merits. See id., at 793. I agree.

The portion of the current tax structure which petitioners challenge was adopted by the Legislature in response to the Supreme Court's 1987 decision holding the prior B & O tax scheme unconstitutional. Tyler Pipe Industries, Inc. v. Washington Department of Revenue, 483 U.S. ___, 97 L. Ed. 2d 199, 107 S. Ct. 2810 (1987). That decision disapproved of the "multiple activities" exemption of that prior tax structure. The Court also suggested explicitly, however, that a system containing a credit for like taxes paid to other states would pass constitutional muster. Id., 107 S. Ct., at 2821. The [p. 3] Legislature has now substituted such a credit system for the unconstitutional exemptions.[2]

Petitioners describe the Supreme Court's discussion of credits in Tyler Pipe as dicta, a characterization also employed

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[2]The petitioners have also challenged the collection of tax for a brief interim period between the date of the Supreme Court decision and the effective date of the new legislation. Though the trial court found petitioners likely to prevail on this point, it nonetheless denied the preliminary injunction because the potential refund amounts are not so large as to expose petitioners to the type of "hardship" argument adverted to earlier. This portion of the trial court's decision is of incidental interest only at this stage. The dispute of significance concerns collections under the new tax.

by this court in National Can II. Petitioners have also devised an elaborate and supportable argument that the new B & O tax credit system merely perpetuates the discrimination against interstate commerce identified and disapproved in Tyler Pipe. Even as dicta, however, the credit suggestion still represents the Supreme Court's most recent assistance on the problem of adapting the B & O tax to satisfy an evolving constitutional standard. And the petitioners' discrimination theory, while plausible, is matched by the State's well-constructed arguments supporting the constitutionality of the new tax structure.

In short, I conclude that the trial court properly assessed the merits of petitioners' challenge, and correctly found no likelihood of success that might qualify as a clear legal or equitable right. On this basis alone, the trial court's denial of the preliminary injunction was neither obvious nor probable error, as would be necessary to warrant discretionary review. RAP 2.3 (b)(1) and (2). [p. 4]

The motion for discretionary review is denied.

DATED at Olympia, Washington, June 16, 1988.

/S/ Geoffrey Crooks
COMMISSIONER

THE SUPREME COURT OF WASHINGTON

AMERICAN NATIONAL CAN CORPORATION, ET AL.	)	
Petitioners,	)	No. 55180-4
v.	)	ORDER DENYING MOTION TO MODIFY COMMISSIONER'S RULING
STATE OF WASHINGTON, DEPARTMENT OF REVENUE, ET AL.	)	
Respondents.	)	

This matter came on before the Court on its July 5, 1988, Motion Calendar on Petitioner's Motion to Modify Commissioner's Ruling. The Court having considered the motion and the files herein;

Now, therefore, it is hereby

ORDERED:

That Petitioner's Motion to Modify Commissioner's Ruling is denied.

DATED at Olympia, Washington this 5th day of July, 1988.

/S/ Robert F. Utter
ACTING CHIEF JUSTICE